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1894.

THE

LAW REPORTS

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AND

PEERAGE CASES.

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JUDGES AND LAW OFFICERS.

MEMORANDA.

1893. *In the Vacation, after Trinity Sittings,* 1893, THE RIGHT HONOURABLE LORD HANNEN, *Lord of Appeal in Ordinary, resigned his office on account of ill-health.*

Sept. 25. THE RIGHT HONOURABLE SIR CHARLES SYNGE CHRISTOPHER BOWEN, *one of the Lords Justices of Appeal, was appointed a Lord of Appeal in Ordinary in the place of* LORD HANNEN, *and was created a Baron for life by the title of* BARON BOWEN OF COLWOOD, *in the county of Sussex. He was succeeded as Lord Justice of Appeal by* SIR HORACE DAVEY, *one of Her Majesty's Counsel.*

1894. *April* 10. THE RIGHT HONOURABLE LORD BOWEN, *Lord of Appeal in Ordinary, died at his residence,* 13, *Prince's Gardens, South Kensington, at the age of* 58.

April 30. SIR CHARLES RUSSELL, *Q.C., M.P., was sworn of the Privy Council.*

May 3. SIR JOHN RIGBY, *Solicitor-General, was appointed Attorney-General in the place of* SIR CHARLES RUSSELL, *and* ROBERT THRESHIE REID, *one of Her Majesty's Counsel, was appointed Solicitor-General in the place of* SIR JOHN RIGBY.

May 7. THE RIGHT HONOURABLE SIR CHARLES RUSSELL, *Q.C., M.P., was appointed a Lord of Appeal in Ordinary in the place of* LORD BOWEN, *and was created a Baron for life by the title of* BARON RUSSELL OF KILLOWEN, *in the county of Down.*

June 14. THE RIGHT HONOURABLE LORD COLERIDGE, *Lord Chief Justice of England, died at his residence,* 1, *Sussex Square, Hyde Park, at the age of* 73.

July 3. THE RIGHT HONOURABLE LORD RUSSELL OF KILLOWEN *was appointed Lord Chief Justice of England in the place of* LORD COLERIDGE.

Aug. 15. THE RIGHT HONOURABLE SIR HORACE DAVEY, *one of the Lords Justices of Appeal, was appointed a Lord of Appeal in Ordinary in the place of* LORD RUSSELL OF KILLOWEN, *and was created a Baron for life by the title of* BARON DAVEY OF FERNHURST, *in the county of Sussex.*

Oct. 19. SIR JOHN RIGBY, *Attorney-General, was appointed a Lord Justice of Appeal in the place of* LORD DAVEY.

Oct. 24. SIR ROBERT THRESHIE REID, *Solicitor-General, was appointed Attorney-General in the place of* SIR JOHN RIGBY.

Oct. 28. FRANK LOCKWOOD, *one of Her Majesty's Counsel, was appointed Solicitor-General in the place of* SIR ROBERT THRESHIE REID.

ERRATA.

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143	foot-note (1)	"Law Rep. 10 H. L. 191"	"10 H. L. C. 191."
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283 284	. . .	"Le Meunier"	"Le Mesurier."

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

[HOUSE OF LORDS.]

H. L. (E.)
1893
Nov. 20.

BIBBY BROTHERS & CO., LIMITED, THE OWNERS OF THE STEAMSHIP "LANCASHIRE" . . . . APPELLANTS;

AND

E. LEETHAM, OWNER OF THE STEAMSHIP "ARIEL" . . . . RESPONDENT.

THE "LANCASHIRE."

Admiralty—Collision—Fog—Regulations of 1884 *for Preventing Collisions at Sea, Art.* 18.

By art. 18 of the Regulations of 1884 for Preventing Collisions at Sea: "Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed or stop and reverse, if necessary."

Two steamships were approaching one another on opposite courses in a fog. One of these, the *L.*, stopped, but did not reverse, and a collision occurred:—

Held upon the evidence that at the time when the *L.* stopped the circumstances were such as to make it apparent to a reasonable and prudent master that in order to avoid risk of collision it was necessary to

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1893

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stop and reverse, and that the decision of the Court of Appeal ([1893] P. 47) that the *L.* was to blame should be affirmed on the above ground, the question for decision being one of fact, not of law.

THE question raised by this appeal from a decision of the Court of Appeal (1) was, as will be seen in the judgments of this House, treated as a question of fact and not of law. It is nevertheless desirable to give some account of the case, by reason of the observations upon *The Ceto* (2). The circumstances are stated in the judgment of Lord Herschell L.C.

Sir *R. E. Webster* Q.C. and *Bucknill* Q.C. (*A. D. Bateson* with them) for the appellants:—

The Court of Appeal treated the question as one of law, and as decided by *The Ceto* (2), whereas it is a question of fact. Art. 18 does not say that whenever it is necessary to stop it is also necessary to reverse: it says, "Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed or stop and reverse, if necessary;" (punctuated thus, see *London Gazettes*, August 19 and 22, 1884). An alternative is given, "or stop," and the words "if necessary" must be read distributively. The master must judge whether under all the circumstances it is necessary to stop without reversing, or stop and reverse. The present art. 18 of the Regulations of 1884 superseded art. 16 of the Regulations of 1863 for Preventing Collisions at Sea which ran thus: "Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse;" (punctuated thus, see *London Gazette*, January 13, 1863). The position of the words "if necessary" in the later art. 18 confirms the construction contended for. It is therefore in every case a question of fact and every case must be judged by its own circumstances. Reversing in some cases would increase the danger: the master must at least have time to consider the situation and the most prudent course; he cannot be bound to stop and reverse instantly unless the circumstances are such as to make it necessary, and they were not in this case, looking at the evidence. Lord Esher M.R. said the Court was bound by the decision in *The*

(1) [1893] P. 47.

(2) 14 App. Cas. 670.

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Ceto (1) and left the question to the nautical assessors in the terms of a passage taken from Lord Watson's judgment. That passage was not necessary to the decision, and went beyond the judgments of the other Lords, and was in fact inconsistent with the decision and with other parts of Lord Watson's own judgment, see pp. 684, 685. The duty of the master must depend, not upon the facts as discovered afterwards, but upon his own observations and the indications which present themselves to him. The true view of the facts is that the master exercised a prudent and reasonable discretion in acting as he did, that there was no risk of collision until he did reverse, and therefore that he obeyed art. 18. [They also referred to *The Kestrel* (2); *The Ebor* (3); *The John McIntyre* (4); *The Khedive* (5); *The Vindomora* (6).]

[LORD HERSCHELL L.C. and LORD HALSBURY:—The decision in such a case as this must depend upon its own circumstances, and not upon the decisions in other cases where the facts are more or less similar. Other cases are not authorities for determining this.]

Sir *W. Phillimore*, *Pyke* Q.C., and *Dawson Miller* for the respondents were not heard.

LORD HERSCHELL L.C.:—

My Lords, this is an appeal from a judgment of the Court of Appeal affirming a judgment of the Admiralty Division. The action was brought in respect of a collision between two steam-vessels, the *Ariel* and the *Lancashire*, which took place in the English channel during a dense fog. Barnes J. in the Admiralty Division found that both vessels were to blame. On appeal the owners of the *Lancashire* contended that their vessel was not to blame; the owners of the *Ariel* did not dispute that their vessel was to blame, but contended that the *Lancashire* was also to blame.

The ground upon which Barnes J. held that the *Lancashire*

(1) 14 App. Cas. 670.
(2) Law Rep. 4 P. C. 529.
(3) 11 P. D. 25.
(4) 9 P. D. 135.
(5) 5 App. Cas. 876.
(6) [1891] A. C. 1.

was to blame was this. About 7.46 in the evening the vessel began to go dead slow, going about three and a half knots, with a tide of about a knot running against her, and she continued on her course at that rate of speed until three minutes past eight o'clock; at that time she stopped her engines and shortly afterwards reversed them. The whistle of the *Ariel* was first heard by the *Lancashire*, according to the evidence of her master and others, about a point or a point and a half on her starboard bow something like two miles distant; and the evidence is that the sound broadened on her bow, as would be the case if the other vessel had been proceeding on her course, so that they would pass one another starboard to starboard; that this broadening continued until about three minutes past eight o'clock when the sound was heard by those on board about two and a half to three points on the bow.

Barnes J. and the Trinity Masters came to the conclusion that, assuming the state of facts to have been substantially as stated by the master, so far as the indications which they received went, the master was nevertheless to blame; that there being this dense fog, with the two vessels approaching one another, although by the sound of the whistle it seemed to those navigating the *Lancashire* that the other vessel was coming in a direction which would take them clear, nevertheless they ought not to have assumed that that state of things would certainly continue; and they ought to have stopped from time to time and so made sure that they would not approach the other vessel at too great a speed, and that the risk of collision would have been in that way avoided.

When the case came before the Court of Appeal the decision was affirmed, but upon another ground. No dissent was in terms expressed from the judgment of the Court below, although it is suggested by Sir Richard Webster, who appears for the appellants, that the Court, so far as they had heard the arguments of the then and the present appellants, were disposed to agree that that judgment was not correct. The Court of Appeal did not hear the arguments of the respondent, but decided the case upon the ground that even assuming that down to the time when the *Lancashire* stopped she had not been to blame, and that

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previously to that there had been no want of care on her part, she was still to blame because at the time when she stopped she ought also to have reversed and not to have delayed her reversing until she heard a subsequent whistle.

My Lords, it appears, as I have said, that down to a little before three minutes past eight the *Ariel*, as we now know her to have been, had, according to the sound, apparently been broadening on the starboard bow of the *Lancashire*, but at about three minutes past eight the whistle appeared to the master of the *Lancashire* not to have broadened since he last heard it. He therefore naturally came to the conclusion that there was some change in the navigation of the *Ariel*. That was certain if he was correct in the conclusion that she had not continued broadening. He gives in his evidence no explanation of the conclusion at which he did arrive beyond saying that he thought this was suspicious. In his statement before the receiver of wreck he said: "By the sound the other vessel was imagined to be approaching us in a dangerous direction, and the engines were stopped." There is no inconsistency between that statement and the statement which he made at the trial—he does not tell us exactly what he suspected, he certainly does not suggest that there was on his mind the impression that the vessel had stopped; and the alternative, as it seems to me, was between her having stopped and her porting.

Under those circumstances the Court of Appeal came to the conclusion, and the nautical assessors agreed with them, that if there was an indication that the vessel was porting, then the master of the *Lancashire* had no right to suppose that the two vessels would pass in safety; that there was a risk of collision and that he certainly ought to have reversed as well as stopped. The nautical assessors gave their opinion only upon that hypothesis; and both from the mode in which the question was put by the learned Master of the Rolls and from the report of the judgments (1) it seems that the Court had come to the conclusion as a matter of fact that that critical whistle when the vessel stopped had of itself given notice to the master of the *Lancashire* and had brought to his mind the fact that the other vessel was porting; it is difficult otherwise to understand the manner in which the question was framed. I do not think it necessary to determine whether that ought to have brought home to his mind the fact that the vessel was porting. It appears to me to be enough if the indication was such as to shew that there was a change in the manœuvring of the other vessel which might and very likely would be a source of danger, because unless she has stopped, then the alternative is that she is porting; and if she is porting, to have continued his course, even with the speed taken off by stopping the vessel, could not, as it seems to me, have any other effect than to render a collision not improbable in the state of fog which then existed.

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(1) [1893] P. at pp. 53–54.

My Lords, it appears to me that the question which has really to be considered by your Lordships is not a question of law at all. I do not propose to analyse the different judgments in the case of *The Ceto* (1), which has been referred to. I doubt very much whether they laid down any law which had not been laid down in previous cases. But it is not necessary, as it seems to me, to determine any question of law here, because I do not think there can be any difference of opinion as to the law which is sufficient to govern this case.

My Lords, I believe all your Lordships are of opinion that the circumstances at the time when the *Lancashire* stopped were such as to make it apparent to a reasonable and prudent master that in order to avoid risk of collision it was necessary to stop and reverse. The view at which your Lordships have arrived has the entire concurrence of the nautical assessor whose assistance we have on the present occasion; and when once that conclusion of fact is arrived at, it appears to me to be impossible to argue that in point of law any other but one conclusion can be reached—namely, the conclusion which has been expressed by the Courts below.

For these reasons, I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

Lord Watson:—

My Lords, I concur.

(1) 14 App. Cas. 670.

LORD HALSBURY:—

My Lords, I also concur; and I only desire to say, as one of those who took part in the judgment in the case of *The Ceto* (2), that I certainly did not intend, in anything that I said, to lay down any new law; but that my observations were directed to the facts of that particular case. I think the facts of that particular case shewed that there were two steamers approaching each other, and known to be approaching each other, under circumstances in which, if they continued so to approach each other, there would be not only a risk of collision, but almost a certainty of collision. Under these circumstances, I was of opinion that both the steamers were to blame, and I believe that all their Lordships, who took the same view of the facts as I did, intended to lay down only that very simple proposition, which I believe would have been perfectly true without reference to any Admiralty rule at all, but only to the most ordinary rule of common sense; and it is a surprise to me to learn that that case is supposed to have laid down any new principle of law.

LORDS ASHBOURNE, MACNAGHTEN, and BOWEN concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 20th November 1893.

Solicitors for appellants: *Pritchard & Sons, for Bateson, Warr, & Bateson, Liverpool.*

Solicitors for respondent: *W. A. Crump & Son.*

[HOUSE OF LORDS.]

H. L. (E.)
1893
Nov. 20.

WILLIAM POWELL (TRADING AS GOODALL, BACKHOUSE & CO.) . . . . APPELLANT;

AND

THE BIRMINGHAM VINEGAR BREWERY COMPANY, LIMITED . . . . RESPONDENTS.

Trade-mark — Registration — "Person Aggrieved" — Patents, Designs and Trade Marks Act 1883 (46 & 47 *Vict. c.* 57) s. 90.

By sect. 90 of the Patents, Designs and Trade Marks Act 1883 the Court may, on the application of any "person aggrieved" by the entry of a trade-mark made without sufficient cause in any register kept under the Act, make such order for expunging the entry as the Court thinks fit.

Where the applicant is in the same trade as the person who has registered the trade-mark, and where the existence of the entry upon the register would or might limit the legal rights of the applicant so that he could not lawfully do that which he could otherwise have lawfully done, he has a locus standi to be heard as a "person aggrieved."

So *held*, affirming the decisions of Chitty J. and the Court of Appeal.

APPEAL from a decision of the Court of Appeal (1).

In 1884 the appellant (trading as Goodall, Backhouse & Co.), a drysalter and wholesale druggist and maker of a sauce known as Yorkshire Relish with a well-known flavour, registered under the Patents, Designs and Trade Marks Acts the trade-mark "Yorkshire Relish," claiming a user for it for about eleven years before the 13th of August 1875.

In 1892 the respondents, who were also manufacturers of sauces and relishes, applied to have the trade-mark expunged upon an affidavit by their manager that he had known the sauce called "Yorkshire Relish" for twenty years, that he had never known those words to be used alone, but always in conjunction with other words and devices for which the appellant had registered other trade-marks, and that the trade-mark in question narrowed the area of business open to the respondents, and excluded them from a portion of the trade into which they desired to enter, and that the rights of the respondents as persons who were engaged in the same trade as the appellant were restricted by the retention on the register of the said trade-mark, and that damage was thereby caused to the respondents.

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(1) Not reported.

Chitty J. ordered the register to be rectified by expunging the trade-mark, holding that the respondents were persons aggrieved within s. 90 of the Act of 1883; and finding as a matter of fact that the term "Yorkshire Relish" had not been used as a trade-mark before 1875.

Before the Court of Appeal the respondents' manager was cross-examined upon his affidavit, and admitted that so far as he knew there was no present intention or desire of his directors to sell Yorkshire Relish, the question never having been discussed at the board in any shape. The Court of Appeal (Lindley, Bowen and Kay L.JJ.) affirmed the decision of Chitty J. on both points, holding upon the point of law that though there was no evidence that the respondents really wished or intended to sell Yorkshire Relish, it might well be that if they could get rid of the trade-mark they would sell it, and that they were therefore "persons aggrieved" within the Act.

Nov. 17. *T. Aston* Q.C. and Sir *R. E. Webster* Q.C. (*John Cutler* with them) for the appellant contended first that to be a "person aggrieved" within s. 90 of the Patents, Designs and Trade Marks Act 1883 the rival trader must actually at the time have an intention or desire to trade in the article in question; that at any rate there must be a reasonable probability of such an intention or desire at some future time; that to hold this to be unnecessary would introduce a new and far-reaching interpretation into the Act, and one not sanctioned by the authorities, and referred to *In re Rivière's Trade-mark* (1); *In re Apollinaris Company's Trade-marks* (2); *Richards* v. *Butcher* (3). Secondly, they contended upon the evidence that the words "Yorkshire Relish" had been as a matter of fact used alone as a trade-mark before 1875.

(1) 26 Ch. D. 48, 54.

(2) [1891] 2 Ch. 186, 224.

(3) [1891] 2 Ch. 522.

Moulton Q.C., *Farwell* Q.C. and *P. H. Fothergill* for the respondents were not heard.

Nov. 20. Lord Herschell L.C.:—

My Lords, the first question raised is whether the respondents were "persons aggrieved" within the meaning of the 90th section of the Trade Marks Act of 1883. That section provides that "The Court may on the application of any person aggrieved . . . by any entry made without sufficient cause in any such register" (that is, a "register kept under this Act") "make such order for expunging or varying the entry as the Court thinks fit." The respondents are in the same trade as the appellant; like the appellant, they deal amongst other things in sauces. The Courts below have held that the respondents are "persons aggrieved." My Lords, I should be very unwilling unduly to limit the construction to be placed upon these words, because, although they were no doubt inserted to prevent officious interference by those who had no interest at all in the register being correct and to exclude a mere common informer, it is undoubtedly of public interest that they should not be unduly limited, inasmuch as it is a public mischief that there should remain upon the register a mark which ought not to be there, and by which many persons may be affected who nevertheless would not be willing to enter upon the risks and expense of litigation. Wherever it can be shewn, as here, that the applicant is in the same trade as the person who has registered the trade-mark, and wherever the trade-mark if remaining on the register would or might limit the legal rights of the applicant so that by reason of the existence of the entry upon the register he could not lawfully do that which but for the appearance of the mark upon the register he could lawfully do, it appears to me that he has a locus standi to be heard as a "person aggrieved." In the present case I do not think it can be doubted that the rights of any person who was in the trade and who might desire to make use of the words "Yorkshire Relish" would be less if this mark were upon the register than they would be if he were only subject to the common law liability of being restrained from making any attempt to pass off his goods as the goods of another person. Both Courts below have come to the conclusion that in that sense the present applicants, the respondents here, are "persons aggrieved," and I can see no reason to differ from the conclusion at which they have arrived.

The only other question is whether these words "Yorkshire Relish" had been used as a trade-mark by the appellant before the year 1875. That they had been used by being put on the outside of the packing-cases in which his goods were sent out is not disputed, but the controversy is whether they were so used as a trade-mark. That is a pure question of fact involving no legal difficulty, and that question of fact has been resolved in favour of the respondents and against the appellant by two Courts. Under those circumstances it would need a very strong case indeed to induce your Lordships to depart from the conclusion at which the Courts below have arrived. I do not propose to discuss the evidence in this case; I can see no ground for supposing that any cardinal fact has been overlooked or that any fact has had undue or unreasonable weight attached to it, and I content myself therefore with saying that I see no reason for differing from the conclusion at which the Courts below have arrived.

I therefore move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

My Lords, this appeal is taken in an application at the instance of the respondent company to have the words "Yorkshire Relish," which were registered as a trade-mark by the appellant in the year 1884, removed from the register. The appellant maintains that the respondents have not shewn any statutory title to insist in the application; and assuming them to have title, that the entry ought not to be expunged because the words in question were used by him as a trade-mark before the 13th of August 1875.

Chitty J. and the Court of Appeal unanimously decided against the appellant on both points. In my opinion neither of them raises a pure question of fact, but a mixed issue of law and fact. In so far as the learned judges in both Courts have concurred in taking the same view of the facts and of the inferences of fact to be derived from them, your Lordships will not, except upon very strong cause shewn, disturb their conclusions. But the rule is strictly confined to questions of fact, and has no reference to questions whether the law has been rightly laid down or rightly applied to the facts found.

Lord Watson.

In disposing of the appellant's contention that the respondents were not "aggrieved persons," it appears to me that the Courts below proceeded on the right construction of sect. 90 of the Act of 1883. In my opinion, any trader is, in the sense of the statute, "aggrieved" whenever the registration of a particular trade-mark operates in restraint of what would otherwise have been his legal rights. Whatever benefit is gained by registration must entail a corresponding disadvantage upon a trader who might possibly have had occasion to use the mark in the course of his business. It is implied, of course, that the person aggrieved must manufacture or deal in the same class of goods to which the registered mark applies, and that there shall be a reasonable possibility of his finding occasion to use it. But the fact that the trader deals in the same class of goods and could use it, is primâ facie sufficient evidence of his being aggrieved, which can only be displaced by the person who registered the mark, upon whom the onus lies, shewing that there is no reasonable probability that the objector would have used it, although he were free to do so. That reading of the statute appears to me to be in substantial conformity with the construction adopted by the Court of Appeal in *In re Rivière's Trade-mark* (1), and also in *In re Apollinaris Company's Trade-marks* (2).

In this case the trade-mark which the appellant claims as his own is registered "in respect of sauce"; and it is not disputed that the respondents' trade embraces the manufacture of sauces. If, as they allege, the appellant had not at the date of registration acquired a right to use the words "Yorkshire Relish," such as the Act of 1883 recognises, they have a primâ facie statutory title to challenge the entry in the register. The appellant maintains that it is established by the evidence that, even if the

(1) 26 Ch. D. 48. (2) [1891] 2 Ch. 186.

Lord Watson.

words had not been appropriated as a trade-mark for his goods, there would have been no reasonable probability that the respondents would ever have found occasion for their use. Whether they would or would not is a mere question of fact, upon which the opinion of all the learned judges is against him; and I need only add that I have been unable to discover any good ground for rejecting their decision.

The second point argued, relating to the user of the words "Yorkshire Relish" as a trade-mark by the appellant, appears to me to involve still less of the legal element than the first. I listened to the argument with the view of learning whether the decisions of the Courts below were to any, and if so to what, extent tainted by legal error, but so far as I could gather no legal defect was pleaded by the appellant. All the learned judges assumed, in my opinion rightly, that the appellant might use, and acquire right to use, as his own, a trade-mark affixed to cases intended for his wholesale trade, as well as another trade-mark affixed to each bottle of sauce which was packed in these cases, and upon which the retail customer admittedly relied.

The real and only substantial objection which the appellant made to the judgments appealed from appeared to me to be this, that in deciding the question of fact the learned judges undervalued the general testimony given by certain witnesses, and gave undue weight to evidence which did not directly contradict it. My Lords, I think in so doing the learned judges were perfectly justified. General statements by witnesses that particular words were used as a trade-mark do not express pure fact; they express the belief of those witnesses that the facts which came under their observation justified the inference that those words were used as a trade-mark. In this case there is an abundance of these general statements, but there are undoubtedly circumstances proved (notably in the cross-examination of the appellant himself) which, when taken per se, point very strongly in another direction. The duty of weighing those two classes of evidence, the one against the other, was a duty imposed upon these learned judges, which they have fulfilled in a manner which would preclude me from disturbing their decision, even if I were disposed, which I am not, to disagree with it.

LORD ASHBOURNE :—

My Lords, I concur. I think that the respondents clearly come within the description of "persons aggrieved." It is manifest that no exact or exhaustive definition is possible; but if the respondents are not entitled to claim the status of "aggrieved persons" it would be difficult to suggest any one who could more aptly be so designated.

They are not common informers or strangers proceeding wantonly; they are persons who believe (on grounds accepted by Chitty J. and the Court of Appeal) that they are interested substantially in contesting this claim of the appellant; and who might be damaged if the mark is retained. It has been pointed out in *In re Apollinaris Company's Trade-marks* (1) that people in the same trade and dealing in the same article would be regarded as aggrieved. In the present case, if free, the respondents might wish to deal in a similar article, and the existence of this mark might hamper and impede them in considering how they would develop and work their business. I do not see any reasons of public policy rendering it at all desirable to unduly narrow the definition of this class of "persons aggrieved."

The second question turns upon the facts. Had the term "Yorkshire Relish" been used as a trade-mark before the 13th of August 1875? Two Courts have on the evidence arrived at a conclusion against such a contention, and the Lord Chancellor has pointed out how slow this House is to reverse or interfere with such conclusions. Personally, I entirely concur in the views of Chitty J. and the Court of Appeal on the subject.

LORD SHAND :—

My Lords, I also am of opinion that the judgments complained of should be affirmed.

(1) [1891] 2 Ch. 186.

It appears to me that where a person is engaged in the same trade as the trader claiming the exclusive right to a registered trade-mark consisting, as here, merely of words describing or designating the article manufactured, and where in the development of his business he may find it advantageous to use the words claimed, he is within the meaning of the statute a "person aggrieved."

On the second question raised in the case it has not been maintained that the learned judges who have dealt with it took any erroneous view of the law; and on the question of fact that the words "Yorkshire Relish" were used as a description of the contents of the boxes merely and not as a trade-mark, I agree in thinking that the concurrent judgments of the two Courts which have considered the case should be held conclusive. Accordingly I also think the judgment should be affirmed.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 20th November 1893.

Solicitor for appellant: *Salaman.*

Solicitors for respondents: *Cooper, Thorowgood & Tabor for Cooper & Co., Newcastle, Staffordshire.*

[HOUSE OF LORDS.]

H. L. (E.)
1893
Nov. 30.

MORGAN EVANS . . . APPELLANT (*Ex parte*).

Licensing Acts—Licensed Person—Public House—Renewal of License—Appeal to Quarter Sessions—Justices equally divided—Adjournment—Licensing Act 9 *Geo.* 4, *c.* 61, *ss.* 9, 27.

Sect. 9 of the Licensing Act 1828 (9 Geo. 4, c. 61)—which enacts that when any question touching the granting, withholding, or transferring any licence shall arise "such question shall be determined by the majority of justices, not disqualified, who shall be present when such question shall arise"—has no application to Courts of Quarter Sessions sitting on appeal.

At the hearing of an appeal to Quarter Sessions against the refusal to renew a licence the Court consisting of four justices was equally divided. Doubts being entertained as to the power of adjournment one of the justices in favour of the appeal withdrew and the appeal was dismissed:—

Held, affirming the decision of the Court of Appeal, that the appeal had been heard and determined and that the appellant was not entitled to a mandamus to the Quarter Sessions to hear and determine it.

APPEAL from an order of the Court of Appeal (not reported).

The appellant being the holder of a licence for a public-house at Cardiff applied for a renewal at the General Annual Licensing Meeting for the borough of Cardiff held in September 1891, when the Court refused to renew the licence. The appellant appealed to the Quarter Sessions for Glamorganshire, and after the appeal had been heard before a Court consisting of four justices the chairman announced that the Court was equally divided. A discussion took place as to the power of the Court to adjourn, the appellant's counsel contending that the Court ought to be adjourned to a day before the next Quarter Sessions with a fresh bench, and the respondents' counsel contending that there was no power to do this. Eventually one of the justices who were in favour of allowing the appeal withdrew, and the appeal was then dismissed.

The appellant having applied to the Queen's Bench Division for a rule nisi for a mandamus to the Quarter Sessions to hear and determine the appeal, the rule was refused by Mathew and

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Wright JJ., and this decision was affirmed by the Court of Appeal.

J. Lawson Walton Q.C. and *James Paterson*, for the appellant:—

The ground of appeal is that the appeal to the Quarter Sessions never was determined, the justices being equally divided, and consequently that the appellant is entitled to a mandamus. It has long been the practice and it is obviously the proper course, when Justices are equally divided, to adjourn the case to another day and so from day to day until there is a majority one way or the other. In *Bodmin* v. *Warligen* (1) it was held that an equal division "was a sufficient warrant for the clerk of the peace to have entered an adjournment, and it was his duty so to have done." This is stated to be the necessary course in 2 Nolan's Poor Laws (4th ed.) 546, citing *Rex v. Justices of Leicestershire* (2) where the same inference is to be drawn from the judgments of Lord Ellenborough and the other judges; and see *Rex* v. *Justices of Monmouthshire* (3); *Reg.* v. *Inhabitants of Fladbury* (4); *Garton* v. *Justices of Southampton* (5). The Court can always go behind the record to see whether there is jurisdiction. Sect. 9 of 9 Geo. 4 c. 61, which enacts that any question touching the granting any licence "shall be determined by the majority of justices, not disqualified, who shall be present when such question shall arise," applies to Courts of Quarter Sessions sitting on appeal as well as to justices at Petty Sessions. The adjournment would not perhaps have been to another Sessions, *Reg.* v. *Belton* (6), and 9 Geo. 4 c. 61, ss. 27, 29; but there was nothing to prevent an adjournment to another day. The fact that one of the justices retired in order to create a majority cannot make the case any better, his opinion having remained unshaken that the appeal ought not to have been dismissed. The justice withdrew his opinion in order that the proper and established course might not be pursued.

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(1) 2 Bott & Const.'s Poor Laws, pl. 982.

(2) 1 M. & S. 442.

(3) 4 B. & C. 844.

(4) 10 A. & E. 706.

(5) 57 J. P. 328.

(6) 11 Q. B. 379.

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LORD HERSCHELL L.C. :—

My Lords, this is an appeal from an order of the Court of Appeal affirming an order of the Divisional Court refusing to grant a rule nisi to shew cause why a writ of mandamus should not be issued to the Quarter Sessions of Glamorganshire to hear and determine an appeal to them from a licensing meeting of the Cardiff justices. At the meeting of the borough justices at Cardiff a renewal of the licence of the appellant was refused. He appealed, as he was entitled to do, to the Court of Quarter Sessions, and so far as appears from the record of the Court of Quarter Sessions that appeal was dismissed. Therefore, so far as the record goes, the appeal appears to have been heard and determined. But the appellant contends that he is entitled to go behind that and to shew that the appeal was not in fact heard and determined for this reason, that after hearing the case and consulting together the magistrates announced, four being present, that they were equally divided in opinion, two of them being in favour of the view of the Court below and two taking the other view. Upon that some discussion arose as to what should be done; there were doubts whether they could adjourn. I shall have to allude presently to that question; but owing to those doubts it was felt (I gather by all of them) desirable that if possible an adjournment, the legality of which was doubtful, should be avoided. Thereupon one of the justices, who was in favour of reversing, said that he was content to withdraw and he did withdraw; and upon that judgment was pronounced, there being three justices present and taking part, dismissing the appeal.

My Lords, it is said that under those circumstances the appeal has not been heard and determined. In my opinion it has. This mandamus can only go if a contrary conclusion be arrived at. It is said first of all that inasmuch as the justices were equally divided there should have been no judgment, and that the proceedings became null. Reliance is placed upon an expression of opinion in the case of *Bodmin* v. *Warligen* (1), that where two justices of the peace had been sitting upon an appeal against an order of removal and had not agreed, the proper entry for the clerk to have made was that the case was adjourned. The entry in fact made was one indicating that the justices were divided, and not one shewing a determination of the case beyond that.

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(1) 2 Bott & Const.'s Poor Laws, pl. 982.

My Lords, it is unnecessary to consider whether under ordinary circumstances, where the justices at Quarter Sessions are equally divided, the proper course is or is not to adjourn to the next sessions. That that has been a common practice I dare say is the case, and I do not consider it necessary to express an opinion whether it is or is not the course which ought to be pursued; I will assume that ordinarily it is the proper course. But this appeal was under the 27th section of the Licensing Act, 9 Geo. 4, c. 61; and it has been held as long ago as *Reg.* v. *Belton* (1) that although in general the Quarter Sessions have jurisdiction to adjourn to the next sessions, yet in the case of an appeal under this licensing section the words of the section are so clear and decisive as to take away that ordinary power of adjournment, and to indicate that at the sessions where the case is heard it must be determined. There could not be an adjournment to the next sessions; but it is suggested by the learned counsel that they might have adjourned to a subsequent day and summoned another set of justices and heard the case over again. It is not necessary to express any opinion upon this point, but assuming that that course might have been adopted no authority has been cited to shew that the Court was in any way bound so to adjourn.

Then what is to happen when the justices under those circumstances are equally divided? The point was pressed upon the Court in *Reg.* v. *Belton* (1), what was to happen if the case could not be adjourned to the next sessions and the justices were equally divided; and there the Chief Justice, Lord Denman, expressed the opinion that in that case the legal result would be that the judgment of the Court below would stand. It is not necessary in the present case to determine that question. All I say is, that it is not to be taken for granted that in the case of an appeal under the Licensing Act that would not be the legal

(1) 11 Q. B. 379.

result. It would seem certainly that if the legal result, it would be a reasonable and natural result.

But even assuming that if nothing more had taken place the appeal could not have been dismissed, what in fact happened was this: One of the justices does withdraw, and judgment is pronounced; and we are asked to go behind that judgment and to say that because the justice withdrawing in order that that end might be brought about still adhered to his opinion that it was a case in which the appeal ought to be allowed, therefore the judgment pronounced by those who remained was a nullity, and so there has been no hearing, or at all events, no hearing and determination. My Lords, I am unable to come to that conclusion. It seems to me impossible to argue it plausibly unless it can be established that sect. 9 applies to Quarter Sessions. Unless it does, what have we here but a Court of Quarter Sessions, competently formed, determining the case, and the determination recorded? To allow an inquiry behind that would, as it seems to me, be to incur all the mischief to which Lord Ellenborough alluded in the case of *Rex* v. *Justices of Leicestershire* (1). But further it seems to me that there is really a decision on the point in a case which I take to be even stronger than the present—namely, *Rex* v. *Justices of Monmouthshire* (2); because there, upon a question of fact vital to the case and which determined it one way or the other, the justices were equally divided, and, although they were equally divided and announced that they were equally divided, they pronounced judgment. In that case it was a judgment differing from the judgment of the Court below, they quashed the order; but the Court of Queen's Bench refused to interfere by mandamus; they said: The justices have heard and determined it; here is the record; here is the determination; they may have gone wrong, but if they have determined it wrongly, we cannot interfere upon this application.

My Lords, it seems to me that the only case here which could be at all made out would be if sect. 9, which requires that "any question touching the granting or withholding of a licence" "shall be determined by the majority of justices, not disqualified, who shall be present when such question shall arise," applies to Quarter Sessions; because then it might perhaps be said that there has been no determination at all, inasmuch as the Legislature has said that it shall be determined by the majority, and as there has been no majority it cannot have been determined. But it seems to me to be absolutely clear that sect. 9 does not apply to Quarter Sessions at all. It in terms enacts "that when at any of the meetings aforesaid" ("the meetings aforesaid" are the meetings mentioned in the previous sections, meetings distinguished from the Quarter Sessions, the Quarter Sessions not being amongst them) "any question touching the granting, withholding, or transferring any licence" "shall arise, such question shall be determined by the majority of justices not disqualified who shall be present when such question shall arise." It seems to me impossible to hold that that applies to Quarter Sessions; and I think there are very good reasons why the Legislature should have confined a provision of that sort to the meetings for which it was providing and not extended it to Quarter Sessions.

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(1) 1 M. & S. 442.

(2) 4 B. & C. 844.

Therefore holding as I do that sect. 9 is inapplicable and that there is no statutory enactment requiring a decision by a majority of justices who shall be present when the question arises, it appears to me that there is a judgment here which it was competent for those who were then present to pronounce, and that it is none the less a determination because one of their number withdrew in the way I have described.

For these reasons I move your Lordships that the judgment appealed from be affirmed and the appeal dismissed.

LORD ASHBOURNE:—

My Lords, I am of the same opinion. In the present case I cannot see that anything has been done at all inconsistent with what is prescribed in the statute. The statute is silent as to any suggestion with regard to the number of magistrates who should sit. The magistrates in the present case appear to me to have adopted, for their own guidance and for carrying out their own business, the convenient rule of practice which has been adopted in all the higher Courts—that is, that before the order is finally entered they consider whether any one of them (it

Lord Ashbourne.

would usually be the junior) would desire to withdraw so as to allow the order to be made. In this particular case that course was adopted; one of the justices who was in favour of reversing what had been done at the original meeting withdrew his judgment, and by that means deliberately allowed the order to be made; and accordingly the order was made, and entered in the book. Under all the circumstances of the case I can see nothing inconsistent either with justice or with what is prescribed by the statute or with the practice of other Courts, rendering it in the slightest degree incumbent upon the House to be astute to find reasons for allowing this appeal. Even if there had been the adjournment which is suggested, even if there had been a grant of the mandamus which was asked for, non constat that the very same thing would not recur; the same four magistrates might again appear constituting a Court of Quarter Sessions, or again an even number of magistrates, more than four, might meet and they again might be equally divided. These are obvious considerations going to shew that even from the point of view of convenience as well as of law there is no ground why this appeal should be assented to.

LORD MORRIS:—

My Lords, I concur.

Order appealed from affirmed and appeal dismissed.

Lords' Journals 30th November 1893.

Solicitors for appellant: *Riddell, Vaizey, & Smith for J. H. Jones, Cardiff.*

[HOUSE OF LORDS.]

DAVID GORMAN . . . . . . APPELLANT (*Ex parte*).

H. L. (E.)

1893

Dec. 1.

Licensing Acts—Licensed Person—Public House—Beer Licence—Renewal of Licence—Notice of Objection—Omission to state Grounds of Refusal—The Wine and Beerhouse Act 1869 (32 & 33 *Vict. c.* 27) ss. 8, 19—*The Wine and Beerhouse Amendment Act* 1870 (33 & 34 *Vict. c.* 29) s. 7—*The Licensing Act* 1872 (35 & 36 *Vict. c.* 94) s. 42—*The Licensing Act* 1874 (37 & 38 *Vict. c.* 49) s. 26.

Sect. 42 of the Licensing Act 1872 enacts that where a licensed person applies for the renewal of his licence the licensing justices shall not entertain any objection to the renewal, unless written notice of an intention to oppose the renewal has been served on the holder not less than seven days before the commencement of the general annual licensing meeting; provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made adjourn the granting any licence to a future day. By s. 26 of the Licensing Act 1874 a notice served under s. 42 of the Act of 1872 shall not be valid unless it states in general terms the grounds on which the renewal is to be opposed.

Where notice of an objection to the renewal of a licence has been served on the holder not less than seven days before the commencement of the general annual licensing meeting, and the renewal is refused, and the holder appeals to Quarter Sessions, all the objections which were open before the licensing justices are open before the Quarter Sessions.

Under ss. 8 and 19 of the Wine and Beerhouse Act 1869, read together with s. 7 of the Wine and Beerhouse Amendment Act 1870, where an application is made to licensing justices for the renewal of certain beer licences, it shall not be lawful for the justices to refuse the renewal except upon one or more of four specified grounds, of which the fourth is that the applicant or the house in respect of which he applies is not duly qualified as by law is required, and where the application is refused on the ground that the house is not qualified, the justices shall specify in writing to the applicant the grounds of their decision.

The holder of one of such licences applied to the licensing justices for a renewal, having been served with a notice of objection not less than seven days before the commencement of the general annual licensing meeting. The justices refused the renewal but omitted to state the grounds of their decision. The holder appealed to Quarter Sessions, and was not served with any fresh notice of objection. When the appeal came on to be heard the appellant contended that as the justices had stated no grounds for their decision it ought to be reversed and the licence granted. The Court overruled this contention and proceeded to hear the case on the merits, whereupon the appellant withdrew declining to take any further part in the proceedings. The Court heard the appeal and dismissed it:—

Held, affirming the decision of the Court of Appeal, that the appeal had

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been heard and determined and that the appellant was not entitled to a mandamus to the Quarter Sessions to hear and determine it.

Reg. v. *Sykes* (1 Q. B. D. 52) and *Ex parte Smith* (3 Q. B. D. 374) commented on.

APPEAL from an order of the Court of Appeal (1).

The appellant was the holder of a licence, in respect of a house in Cardiff, for the sale by retail therein of beer to be consumed on the premises, the house having been licensed before 1869 and continuously licensed since then. In September 1891 the appellant applied to the general annual licensing meeting for a renewal of his licence, having been duly served with a notice of objection to the renewal in pursuance of the Licencing Acts 1872 and 1874. The renewal was refused by the justices, no ground for the refusal being stated. The appellant appealed to Quarter Sessions, and at the hearing his counsel pointed out that no ground for the refusal had been given, and contended that the appellant was unable to ascertain what evidence was required to shew that the decision was erroneous and that the Court was consequently bound to reverse it and grant the licence. The Court overruled this point, whereupon the appellant withdrew and took no further part in the hearing. The Court then heard evidence and dismissed the appeal, giving no ground for the refusal. The Queen's Bench Division (Mathew and Wright JJ.) refused an application by the appellant for a rule nisi for a mandamus to the Glamorganshire Quarter Sessions to hear and determine the appeal, and this decision was affirmed by the Court of Appeal.

Sect. 8 of the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27) enacts that no application for a certificate under the Act in respect of a licence to sell by retail beer, cider, or wine, not to be consumed on the premises, shall be refused except upon one or more of four specified grounds, of which the fourth is: "That the applicant, or the house in respect of which he applies, is not duly qualified as by law is required."

Sect. 8 then enacts: "Where an application for any such last-mentioned certificate is refused on the ground that the house in respect of which he applies is not duly qualified as by law is required, the justices shall specify in writing to the applicant the grounds of their decision."

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(1) Not reported.

By sect. 19: "Where on the 1st of May 1869 a licence under any of the said recited Acts is in force with respect to any house or shop for the sale by retail therein of beer, cider, or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premises in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine, not to be consumed on the premises, may be refused in accordance with this Act."

Sect. 7 of the Wine and Beerhouse Amendment Act 1870 (33 & 34 Vict. c. 29) enacts that the 19th section of the Act of 1869 shall extend to licences granted by way of renewal from time to time of licences in force on the first day of May 1869, whether such licences continue to be held by the same person or have been or may be transferred to any other person or persons.

By sect. 42 of the Licensing Act 1872 (35 & 36 Vict. c. 94), "Where a licensed person applies for the renewal of his licence the following provisions shall have effect . . . .

"(2.) The justices shall not entertain any objection to the renewal of such licence or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made adjourn the granting of any licence to a future day and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given. . . ."

By sect. 26 of the Licensing Act 1874 (37 & 38 Vict. c. 49), A notice of an intention to oppose the renewal of a licence served under sect. 42 of the Act of 1872 shall not be valid unless it states in general terms the grounds on which the renewal of such licence is to be opposed.

Nov. 30, Dec. 1. *J. Lawson Walton* Q.C. and *James Paterson,* for the appellant:—

Where licensing justices refuse to state the ground on which they refuse to renew a licence under the 32 & 33 Vict. c. 27, and state only that they have not refused it on the fourth ground, their decision is not a hearing and determination, and the appellant is entitled to a mandamus to the justices to hear and determine: *Reg.* v. *Sykes* (1). And this is so where the justices, without refusing, simply omit to state the ground: *Ex parte Smith* (2). The same law must apply to an appeal to Quarter Sessions. Justices in Quarter Sessions are in the same position as the licensing justices and must be governed by the same rules. An appeal to Quarter Sessions is a hearing de novo; the appellant does not begin, but the respondents, on whom the onus lies of shewing that their decision was correct. As no ground for the refusal was stated the appellant had no means of knowing what objection would be taken or of bringing evidence to meet it. The Quarter Sessions ought either to have granted the licence or adjourned the hearing and required notice to be given to the appellant of the objections he had to answer. The present case is stronger than *Reg.* v. *Sykes* (1), for here the licensing justices did not even state that they had not refused the renewal on the fourth ground. The appellant is therefore entitled to assume that it was refused either on the fourth ground or on some ground other than those specified in the Act; and if so the proceedings were null and void. Moreover, notice of objection ought to have been served on the appellant not less than seven days before his appeal came on, as required by sect. 42 of the Licensing Act 1872. The words of sect. 42 are no doubt "not less than seven days before the general annual licensing meeting," but in *Ruddick* v. *Liverpool Justices* (3) it was held that this enactment applied to the Court of Quarter Sessions as much as to the licensing justices, and that where the licensing justices

(1) 1 Q. B. D. 52.

(2) 3 Q. B. D. 374.

(3) 42 J. P. 406.

had refused the renewal of a licence upon an objection started for the first time in Court by one of themselves and without granting an adjournment, and the Court of Quarter Sessions on appeal had dismissed the appeal, the applicant was entitled to a certiorari to quash the order of Quarter Sessions, and to have a renewal of the licence. Being in ignorance of the ground on which the licensing justices had refused the renewal and of the objections which would be urged against him, the appellant was manifestly unable to prepare his case, and there was a plain miscarriage of justice for which a remedy should be found.

LORD HERSCHELL L.C.:—

My Lords, this is an appeal from a judgment of the Court of Appeal, affirming an order of the Divisional Court refusing to grant a rule nisi for a mandamus to the justices of Glamorganshire commanding them to hear and determine an appeal. The case arose in this way: the appellant applied to the licensing meeting for a renewal of his licence, and that renewal was refused. The case was one in which, under the Licensing Acts, the licence could only be refused upon one or more of four specified grounds. I need not trouble your Lordships by reading them all; but the last is: "That the applicant or the house in respect of which he applies is not duly qualified as by law is required." That is important, because these words follow: "Where an application for any such last-mentioned certificate is refused on the ground that the house in respect of which he applies is not duly qualified as by law is required, the justices shall specify in writing to the applicant the grounds of their decision." In the present case the justices refused the licence, but did not state on which of the four specified grounds they had so refused it. It is said on behalf of the appellant that, not having done so, they have not heard and determined the case. In support of that contention two cases, namely, *Reg.* v. *Sykes* (1) and *Ex parte Smith* (2), have been cited. In *Reg.* v. *Sykes* (1) the justices, though requested, had refused to state on which of the grounds they did not grant the renewal of the licence; and they did not state it in the proceedings for a mandamus to them to hear and determine. It was

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(1) 1 Q. B. D. 52.

(2) 3 Q. B. D. 374.

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held in that case that they had not "heard and determined" the case. In *Ex parte Smith* (1), it appeared that no application had been made for the grounds to be stated; the Court, nevertheless, held that the mandamus must go, in respect that the justices had not "heard and determined" the case before them. Certainly the result is somewhat peculiar, because the justices, having heard the case in point of fact, having heard all the evidence, having determined it in this sense, that they had expressed a judgment upon it, namely, refusing a licence—a judgment which they had power to pronounce—and it being possible, to say the least, that they had acted upon one of the grounds upon which the law entitled them to act, it was held that, although they might have in fact acted within their jurisdiction, heard all the evidence, and determined the case according to law, nevertheless they had not "heard and determined" it. My Lords, it is not necessary to say whether those decisions can be supported or not; although I do not propose to say anything which is to be taken as a dissent from them, I guard myself from being supposed to assent to them.

But, assuming that they are sound decisions, then no doubt it was open to the present appellant to go to the Court for a mandamus to the licensing justices to "hear and determine" the case. However, his position being that they have not "heard and determined" the case, that the petition had never been heard and determined in the Court below at all, he appealed to the Quarter Sessions as from a decision and determination. When the case came before the Court of Quarter Sessions, he took the preliminary point that the justices below not having stated their reasons, the Court of Quarter Sessions had no alternative but to reverse their judgment, and to grant him his licence. The Court overruled this point, and said they would hear the case on the merits, whereupon the appellant withdrew, and the appeal was heard and dismissed.

Now the appellant puts his case in this way; he says: No licence can be interfered with, and there must be a renewal of it, unless notice of objection has been given; before the Court of Quarter Sessions there was no notice of objection, therefore that

(1) 3 Q. B. D. 374.

Court ought to have reversed the judgment of the Court below, and given me my licence, because no objection could be made to it in that Court, no fresh notice of objection having been given. My Lords, it is admitted by the learned counsel for the appellant that unless his contention is correct, that the justices at Quarter Sessions had no power to consider the case, in view of the objections given before the licensing sessions, and could only consider any objections of which notice was subsequently given on the appeal to the Quarter Sessions, his application must fail.

The provisions with regard to notice of an intention to oppose the renewal of a licence are contained in the Licensing Acts, 1872 and 1874. [His Lordship read the enactments set out above.] In terms the plainest and most unmistakable those enactments apply, and apply only, to the licensing justices and to a notice given not less than seven days before the commencement of the general annual licensing meeting. It seems impossible to say that that is a provision relating at all to a notice to be given previous to the hearing at the Quarter Sessions. At what date is it suggested that that notice is to be given? Can it be contended that you are to understand "seven days before" "the general annual licensing meeting" as meaning seven days before the meeting of Quarter Sessions? That would not be construing the Act.

It does not follow that the case of *Ruddick* v. *Justices of Liverpool* (1) was wrong, even if what I have indicated be the true construction of the section, because it may well be that if you have given no notice under that section to found your case before the licensing justices the Quarter Sessions cannot, without adjourning the case or without notice, go into the objections of which at no time and nowhere has the applicant had notice. But I apprehend that as regards notices given under this section in relation to proceedings before the licensing justices, when the licensing justices have "heard and determined" the case, and when there is an appeal to the Quarter Sessions, all those points which were open by reason of those notices before the licensing justices must be open before the Court of Quarter Sessions. To suppose that when the case has been decided against the applicant and

(1) 42 J. P. 406.

he appeals you must immediately begin to serve fresh notices over again in relation to those matters of which he has already had notice and which have already been in contest before the licensing justices, seems to me to be inserting a provision which is nowhere to be found in the Act of Parliament, and which neither reason nor justice requires.

Therefore, I apprehend that it was perfectly competent to the Court of Quarter Sessions to entertain, on the hearing of this appeal, the objections which, by reason of the notice properly given according to the statute, were open in the Court below. That being so, it is admitted by the learned counsel for the appellant that when the justices expressed their intention to proceed with the case, as they were entitled to do, the appellant retired. He cannot now come and ask your Lordships for a mandamus to "hear and determine" an appeal from the judgment which on his retiring the justices pronounced.

For these reasons I move your Lordships that the judgment appealed from be affirmed and the appeal dismissed.

Lords ASHBOURNE and MORRIS concurred.

Order appealed from affirmed, and appeal dismissed.

Lords' Journals 1st December 1893.

Solicitors for appellant: *Riddell, Vaizey & Smith, for J. H. Jones, Cardiff.*

[PRIVY COUNCIL.]

J. C.*
1892
July 21, 22, 23;
1893
July 26, 29; Dec. 9.

TENNANT . . . . PLAINTIFF;

AND

THE UNION BANK OF CANADA . . . DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

British North America Act, s. 91, *sub-s.* 15; s. 92, *sub-s.* 13 — *Validity of Dominion Bank Act* (46 *Vict.* c. 120)—*Negotiability of Warehouse Receipts —Construction.*

Although warehouse receipts granted to itself by a firm which has not the custody of any goods but its own are not negotiable instruments within the meaning of the Mercantile Amendment Act (c. 122 of the Revised Statutes), *held*, that the Dominion Bank Act (46 Vict. c. 120), while it was in force dispensed with that limitation, validated such receipts, and transferred to the indorsees thereof the property comprised therein:—

Held, further, that the Bank Act was intrà vires of the Dominion Parliament.

Sect. 91, sub-sect. 15, of the British North America Act, 1867, gives to that parliament power to legislate over every transaction within the legitimate business of a banker, notwithstanding that the exercise of such power interferes with property and civil rights in the province (see sect. 92, sub-sect. 13), and confers upon a bank privileges as a lender which the provincial law does not recognise.

The legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in sect. 91, is of paramount authority even though it trenches upon the matters assigned to the provincial legislature by sect. 92.

Cushing v. *Dupuy* (5 App. Cas. 409) followed.

APPEAL from a decree of the Court of Appeal (Jan. 8, 1892), affirming a decree of the Chancellor of the province (June 4, 1890) which dismissed the appellant's action with costs.

The facts and proceedings are stated in the judgment of their Lordships. The question in controversy was as to the validity of the warehouse receipts therein mentioned for the purpose of

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* *Present at the first argument:*—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, and MR. SHAND. *Present at the second argument:*—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and SIR RICHARD COUCH.

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creating and passing title to the goods comprised therein. In the Courts below the course of judicial opinion was as follows: The Chancellor held that the dealings in question had been substantially between the insolvents and the bank direct, and not between the bank and Peter Christie as a principal. He held that under the Dominion Bank Act Peter Christie, as the indorser of the warehouse receipts, was the agent of the insolvents within the meaning of the Act, and as such could transfer a valid title to the bank by re-indorsing such receipts to them.

In appeal, Hagarty, C.J., held that, apart from the receipts, the bank acquired a valid title by virtue of the agreement of October, 1887; and that the receipts gave a valid title apart from such agreement.

Osler, J.A., held that the receipts were valid under the Dominion statute on the ground that the insolvents, as mill-owners, were within sect. 54 of the Act, and that, as they were given in pursuance of a provision to that effect at the time the advances were made, they came within the saving clause of sect. 53.

Maclennan, J.A., held that by virtue of the agreement of October 1887, Peter Christie acquired an equitable interest in the lumber as soon as the advances were made. The receipt of the 17th of November, 1888, was valid under the Dominion Act, and it was immaterial under the Act whether it passed to the bank direct from the insolvents or through the intervention of Peter Christie. Besides, the receipts gave a valid title apart from either the provincial or the Dominion statutes.

Burton, J.A., dissented. He held that the dealings in question were between the bank and Peter Christie, and not between the bank and the insolvents; that the receipt of the 12th of July, 1888, was not a warehouse receipt within the meaning of the Bank Act, because the logs therein mentioned were not and did not purport to be then warehoused or stored in any place, but were in transit. Even if it were a warehouse receipt within the meaning of the Act, it could only be valid on the assumption that Peter Christie, as stated therein, was the owner of the goods covered by it, which was not the case. As regards the later receipts, no promise to the bank to grant receipts made contem-

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poraneously with the advances was proved either in the case of Peter Christie or of the insolvents. He held that Peter Christie did not acquire under the Ontario Act any property under the receipts, and consequently could not transfer any to the Bank, not being an agent of the insolvents within the meaning of sect. 53, sub-sect. 3, of the Bank Act.

M'Carthy, Q.C. (of the Canadian bar), and *Gore*, for the appellant, contended that, as pointed out in the judgment of Burton, J.A., the counsel for the bank had at the trial expressly stated that they claimed title under the Bank Act, and not under the agreement of the 1st of October, 1887, or otherwise, and therefore could not on appeal be allowed to set up a different case. Their title, if any, depended on the provisions of the Bank Act, and not otherwise. There was no evidence of any dealing either between the bank and the insolvents, or between the bank and Peter Christie, such as would entitle the bank to rely on any of the receipts as having been given in pursuance of any promise made to the bank contemporaneously with any advances. The so-called warehouse receipts were not such within the meaning either of the Ontario Act or the Bank Act. On the true construction of the Ontario Act Peter Christie acquired no title to the goods by virtue of those receipts, and whether he did so or not he could not pass title to the bank. Reference was made to sects. 53 and 54 of the Bank Act, and it was contended that thereunder the bank had no right to retain the property in suit against the appellant. Such sections should be strictly construed, because the authority to transfer property by receipts of this description is in contravention of the general law against secret conveyances and works great hardship upon creditors who give credit in ignorance of their existence: see c. 125 of the Revised Statutes. This c. 125 applies to all warehouse receipts which do not come strictly within the terms of the Bank Act; and under it there must be change of possession or registration to validate an assignment. See *Todd* v. *Liverpool and London Globe Insurance Company* (1); *Bank of British North America* v.

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(1) 18 Upper Canada (N.S.) C. P. 192; S. C., 20 Upper Canada (N.S.) C. P. 523.

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Clarkson (1). Warehouse receipt does not, under the Bank Act, mean a receipt given to the owner of the goods by himself. Further, the provisions of sects. 53 and 54 were ultrà vires the Dominion Parliament. This point had not been argued in the Courts below, having been concluded as regards the Courts of the colony by *Merchants' Bank of Canada* v. *Smith* (2), which held that the Dominion Banking Act, 1871 (34 Vict. c. 5), s. 46, was within the powers of that Parliament.

Robinson, Q.C. (of the Canadian bar), *Symons* with him, for the respondents, was first heard as to the merits on the assumption that the Bank Act was valid:—

It was contended that the appellant could have no better right of action, in respect of the matters complained of, than the insolvents had. These latter could not be heard to allege that the receipts were defective in form and to impeach their validity. They were under contract to give warehouse receipts valid within the meaning of the Bank Act or otherwise, and could be compelled to perform their agreement. The receipts in question were authorized by the Bank Act, and the bank had a valid title as indorsee thereof to the property in suit. So far as the Dominion Act was at variance with the Ontario Mercantile Amendment Act (see sect. 14, et seq. of the latter) the Dominion Act must prevail. But even apart from the Bank Act the respondent was entitled. The agreement of the 1st of October, 1887, continued as a binding contract after the payment of the claim of the Federal Bank. The insolvents and Peter Christie were both bound by it. Under it Peter Christie had a valid lien on the property in suit, and the benefit of that lien passed to the bank. With regard to the Chattel Mortgages Act cited on the other side (i.e., c. 125), it does not apply to an equitable right, which this is if not within the Bank Act. Reference was made to *Clarkson* v. *Ontario Bank* (3); *Lumsden* v. *Scott* (4); *Burland* v. *Moffatt* (5); *Banks* v. *Robinson* (6); *Coyne* v. *Lee* (7); *Holroyd* v.

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(1) 19 Upper Canada (N.S.) C. P. 182.

(2) 8 Sup. Ct. Can. Rep. 512, affirming a decision in the same case reported in 8 Ontario Appeals, 15.

(3) 15 Ontario Appeals, 166.

(4) 4 Ontario Rep. 323.

(5) 11 Sup. Ct. Rep. 76.

(6) 15 Ont. Rep. 618, 623.

(7) 14 Ontario Appeals, 503.

Marshall (1); *Brown* v. *Bateman* (2); *Citizens Insurance Company* v. *Parsons* (3); *Merchants' Bank* v. *Smith* (4); *Reeve* v. *Whitmore* (5); *Federal Bank of Canada* v. *Canadian Bank of Commerce* (6); *In re Colman* (7); *Dominion Bank* v. *Davidson* (8).

M'Carthy, Q.C., replied, referring to *Bank of Toronto* v. *Perkins* (9); *McAllister* v. *Forsyth* (10).

The case then stood over till the 26th of July, 1893, when the second argument took place, limited to the question whether sects. 53 and 54 of the Bank Act were ultrà vires the Dominion Parliament.

M'Carthy, Q.C., and *Gore*, contended that they were so:—

The onus was on the other side to shew that this Act was authorized by the terms of sect. 91 of the British North American Act, 1867: see *L'Union St. Jacques de Montréal* v. *Bélisle* (11). The real question is whether the provisions in dispute are admissible under the head of banking, or whether they relate to property and civil rights in the province. It was contended that they came within art. 13 of sect. 92. Reference was made to *Citizens Insurance Company* v. *Parsons* (12); *Merchants' Bank* v. *Smith* (13). See also *Quirt* v. *The Queen* (14); *Reg.* v. *Robertson* (15); *Pigeon* v. *Recorder's Court and City of Montreal* (16).

Sects. 91 and 92 must be read together, and the power of the Dominion Parliament in regard to banking operations must be so exercised as not to interfere with property and civil rights in the province. Regulations with regard to the validity and effect of warehouse receipts clearly relate to property and civil rights. They are not negotiable instruments in favour of private

(1) 10 H. L. C. 191.
(2) Law Rep. 2 C. P. 272.
(3) 4 Sup. Ct. Can. 215.
(4) 8 Sup. Ct. Can. 512.
(5) 33 L. J. (Ch.) 63.
(6) 13 Sup. Ct. Can. 384, 394.
(7) 36 Upper Canada, 559, 581.
(8) 12 Ontario App. 90.
(9) 8 Sup. Ct. Can. 603.
(10) 12 Sup. Ct. Can. 1.
(11) Law Rep. 6 P. C. 31.
(12) 7 App. Cas. 96.
(13) 8 Sup. Ct. Can. 512; S.C., 1 Cart. 828; 8 Ontario App. Rep. 15.
(14) 19 Sup. Ct. Can. 510.
(15) 6 Sup. Ct. Can. 52, 55.
(16) 17 Sup. Ct. Can. 495.

lenders by the law of the province, and it was not the intention of sect. 91 to authorize privileges being conferred on banks which are not recognised by the provincial law. The same objection would not apply to disabilities being imposed on banks in comparison with private lenders, for it would not be to the same extent an interference with property and civil rights.

Reference was also made to *Cushing* v. *Dupuy* (1); *Clarkson* v. *Ontario Bank* (2); *Hodge* v. *The Queen* (3); *Colonial Building Association* v. *Attorney General of Quebec* (4).

Sir *Horace Davey*, Q.C., and *Robinson*, Q.C. (of the Canadian bar), for the respondent, contended that the provisions of the Bank Act were within the powers of the Dominion Parliament. They related strictly to banking operations, and were intended to protect and facilitate advances by bankers to their customers by authorizing loans on warehouse receipts. The subject of the enactment is reserved exclusively to the parliament of the Dominion by sect. 91, and even if the subject can also be brought within any of the sub-sections of sect. 92, still the power of the Dominion is paramount: see *Cushing* v. *Dupuy* (1). The power exercised in this case was never questioned till 1880, in *Smith* v. *Merchants' Bank of Canada* (5).

With regard to the documents called warehouse receipts, they were first authorized by a Canadian statute in 1859 (22 Vict. c. 20), which applied both to banks and individuals. Then came the Act of 1867, sect. 91 of which assigned to the exclusive jurisdiction of the Dominion Parliament the subjects of the regulation of trade and commerce, banking, incorporation of banks, bills of exchange, and promissory notes. Since that Act the validity and effect of such instruments, in connection with banks, has been dealt with by the Dominion Parliament. As regards individuals, the same instruments have been regulated by the provincial legislature: see statutes of Canada, 24 Vict. c. 23, 29 Vict. c. 19: Dominion Acts, 31 Vict. c. 11, 33 Vict. c. 11, 34 Vict.

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(1) 5 App. Cas. 409.

(2) 15 Ontario App. Rep. 166.

(3) 9 App. Cas. 117.

(4) 9 App. Cas. 157.

(5) 28 Grant, 629; 8 Ont. App. 15; 8 Sup. Ct. Can. 512.

c. 5, 43 Vict. c. 22; and Revised Statutes of Ontario (1877), c. 116, and (1887), c. 122.

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M'Carthy, Q.C., replied.

1893. Dec. 9. The judgment of their Lordships was delivered by

LORD WATSON:—

Christie, Kerr & Co., saw-millers and lumberers at Bradford, in the Province of Ontario, became insolvent in April, 1889. The Union Bank of Canada, respondents in this appeal, subsequently took possession of and removed a quantity of lumber which was stored in the yard of the firm at Bradford. This action was brought against the respondents in December, 1889, for damages in respect of their alleged conversion of the lumber, by Mickle, Dyment & Son, personal creditors of the insolvent firm, in the name of James Tennant, as assignee or trustee of the firm's estate, by whom they were duly authorized to sue, in his name, for their own exclusive use and benefit.

Christie, Kerr & Co., to whom it may be convenient to refer as the firm, had a timber concession in the county of Simcoe, where, according to the course of their business, the pine wood was felled and cut into logs, which were marked with the letters "C. K.," the initials of the firm. The logs were then conveyed, chiefly by water, to their mill at Bradford, where they were sawn and stored for sale.

In order to obtain funds for carrying on their trade during the season of 1888, the firm, in October 1887, entered into a written agreement with Peter Christie, son of Alexander Christie, its senior partner, who agreed to advance the money necessary upon receiving a lien by way of security upon all the timber cut or manufactured by the firm. On the other hand, the firm undertook to do everything that was necessary in order to make such lien effectual, and for that purpose to execute any documents which might be required.

In pursuance of that agreement promissory notes were granted by Peter Christie, which the Federal Bank of Canada discounted under an arrangement by which they were to receive warehouse receipts covering all the timber belonging to the firm. Peter Christie assigned to the bank all right and benefit which he had under the agreement of October, 1887. The course of dealing with the bank was, that the firm granted warehouse receipts to themselves, which they indorsed to Peter Christie, by whom they were indorsed to the bank.

The Federal Bank went into liquidation in June, 1888, at which date their advances amounted to about $50,000. In order to meet the claim of the liquidator, Alexander Christie applied for accommodation to the respondents, who agreed to give it upon terms which were arranged between him and Mr. Buchanan, their manager. The agreement was verbal; and its terms, which are of considerable importance in this case, appear from the following statements made by Alexander Christie in the course of his evidence, which are substantially corroborated by Mr. Buchanan, and are nowhere contradicted: "That we and Peter Christie should give his notes, that Christie, Kerr & Co. and A. R. Christie should indorse them, and that there should be a warehouse receipt covering all the logs that they had, and the lumber that was to be manufactured from them." "The intention was to give the security of the logs and of the lumber as it was manufactured." "We were to give them a receipt at once upon the whole of the logs, and as the logs progressed we made a continuation to where they were." "Warehouse receipts were to be furnished until the debt was paid."

There was not, as in the case of the Federal Bank, any assignment to the respondents of Peter Christie's rights under the agreement of October, 1887. It is clear, from the account which he gives of the transaction, that Alexander Christie dealt with the respondents as the representative of his firm, and also as representing his son Peter, from whom he held a power of attorney. Peter Christie took no part, personally, in any of the transactions, either with the Federal Bank or with the respondents. From first to last, so far as his interests were concerned, all arrangements were made and all documents connected with them, whether promissory notes or warehouse receipts, were executed and subscribed by his father, on his behalf.

Upon the faith of the agreement the respondents made advances to the amount of $52,600 upon promissory notes of Peter Christie, indorsed to them by his attorney and also by the firm. On the 20th of June, 1888, they received a warehouse receipt for 70,000 pine saw logs, marked "C. K.," which were described as then stored in the Lakes St. Jean and Couchiching, en route to Bradford mill. These logs represented the whole pine timber which had been cut for transportation to Bradford during the season of 1888; and as they arrived at their destination, and were sawn up, fresh receipts were given to the respondents, containing a description of the timber in its manufactured state. Portions of the lumber were from time to time sold by the firm, with the consent of the respondents, and the proceeds applied in reduction of their advances.

The last of the series of receipts deposited as security with the respondents is dated the 1st of January, 1889, by which time all the logs covered by the first receipt of the 20th of June, 1888, had reached Bradford, and had been converted into lumber. It includes the whole of the timber forming the original subject of the security which then remained unsold and in the possession or custody of the firm. Though not in precisely the same form as the rest, it may be taken as a specimen, because it was not contended that the differences of form were material. It runs thus:—

"The undersigned acknowledges to have received from Christie Kerr and Company, owners of the goods, wares and merchandise herein mentioned, and to have now stored in the premises known as the Bradford sawmill yard, adjoining the village of Bradford, in the county of Sincoe, the following goods, wares and merchandise, viz.:—Five millions eight hundred and fifty-three thousand nine hundred and twenty-four feet of lumber, one hundred and ninety-three thousand of shingles, all marked 'C. K.,' and manufactured during season 1888 out of saw logs cut in the townships of Oakley and Hindon, and transported to Bradford mill and cut there, which goods, wares and merchandise are to be delivered pursuant to the order of the said Peter Christie to be indorsed hereon, and are to be kept in store till delivered pursuant to such order."

"This is intended as a warehouse receipt within the meaning of the statute of Canada, intituled 'An Act relating to Banks and Banking,' and the amendments thereto, and within the meaning of all other Acts and laws under which a bank of Canada may acquire a warehouse receipt as a security."

This receipt was, like its predecessors, signed by the firm, and by them indorsed to Peter Christie, and was then indorsed on his behalf by Alexander Christie, and delivered to the respondents.

It is not matter of dispute that the timber of which the respondents took possession, after the insolvency of the firm, was included, either as saw logs or as lumber, in all the receipts which they received as security. But it does not appear to their Lordships that these receipts could be regarded as negotiable instruments carrying the property of the timber if their effect depended upon the provisions of the Mercantile Code which is contained in the Revised Statutes of Ontario, 1887.

The Mercantile Amendment Act (c. 122 of the Revised Statutes) deals with warehouse receipts and other mercantile documents which are effectual to transmit the property of goods without actual delivery. That statute not only recognises the negotiability of warehouse receipts by custodiers who are not the owners of the goods; it extends the privilege to receipts by one who is both owner and custodier, but that only in cases where the grantor of the receipt is, from the nature of his trade or calling, a custodier for others as well as himself and therefore in a position to give receipts to third parties. The receipts in question do not comply with the requirements of the Act, because it is neither averred nor proved, that the firm, in the course of their business, had the custody of any goods except their own.

It may also be noticed that c. 125 of the Revised Statutes enacts that when goods are transferred by way of conveyance or mortgage, possession being retained by the transferor, the deed of conveyance or mortgage, if not duly registered, shall be absolutely null and void as against creditors of the grantor or mortgagor.

In these circumstances, certain provisions of the Bank Act, which was passed by the legislature of the Dominion (46 Vict.

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c. 120) and is specially referred to in the receipts held by the respondents, become important. Although now repealed, the Act was in force during the whole period of these transactions; and, if competently enacted, its provisions must, in so far as they are applicable, govern the rights of parties in this litigation.

Sect. 45 provides that the bank shall not, either directly or indirectly, lend money or make advances upon the security or pledge of any goods, wares, or merchandise except as authorized by the Act.

Sect. 53, sub-sect. 2, authorizes the bank to acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favour in the course of its banking business. The document so acquired vests in the bank "all the right and title of the previous holder or owner thereof, or of the person from whom such goods wares or merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favour of the bank, instead of to the previous holder or owner of such goods wares or merchandise." Sub-sect. 3 of the same clause provides that if the previous holder of such warehouse receipt or bill of lading is the agent of the owner, the bank shall be vested with all the right and title of the owner, subject to his right to have the goods re-transferred to him upon payment of the debt for which they are held in security by the bank.

Sect. 54, which deals specially with the case of the custodier and owner of the goods being one and the same person enacts that:—

"If any person who grants a warehouse receipt or a bill of lading is engaged in the calling, as his ostensible business, of keeper of a yard, cove, wharf or harbour, or of warehouseman, miller, saw-miller, maltster, manufacturer of timber, wharfinger, master of a vessel, or other carrier by land or by water, or by both, curer or packer of meat, tanner, dealer in wool or purchaser of agricultural produce, and is at the same time the owner of the goods, wares and merchandise mentioned in such warehouse receipt or bill of lading, every such warehouse receipt or bill of lading, and the right and title of the bank thereto and to the goods, wares and merchandize mentioned therein, shall be as valid and effectual as if such owner, and the person making such warehouse receipt or bill of lading, were different persons."

These enactments go beyond the provisions of sect. 16 of the Mercantile Amendment Act. They omit the limitation of the provincial statute, which requires, in order to validate a warehouse receipt by a custodier who is also owner, that the trade or calling in which he is ostensibly engaged must be one which admits of his granting receipts on behalf of other owners whose goods are in his possession.

The Chancellor of Ontario dismissed the suit with costs; and the Court of Appeal affirmed his decision. Upon the evidence before them, all the learned judges, with one exception, came to the conclusion that the transaction was substantially one between the firm and the respondents, and that Peter Christie's position was really that of an intermediary; and consequently that the respondents had a right, against the firm, to demand and receive warehouse receipts for the timber in security for their advances. Burton, J.A., was of opinion that the respondents must be held to have dealt with Peter Christie alone; that the receipts in his hands were not valid either according to provincial law or under the provisions of the Bank Act, and that his indorsation could not pass any interest in the timber to the respondents.

In the view which he took of the real character of the transaction, the Chancellor held that the receipts were effectual, mainly on the ground that Peter Christie, in indorsing them, ought to be regarded as the agent of the firm within the meaning of sect. 53, sub-sect. 3, of the Bank Act. Hagarty, C.J., and Maclennan, J., who with Osler, J., constituted the majority of the Appeal Court, held that the receipts, having been given directly to the respondents by the firm, under an obligation to that effect, were made effectual by the provisions of the Bank Act. They also held that, assuming the receipts not to be within the protection of the Bank Act, Peter Christie had, as between himself and the firm, an equitable lien on the timber which passed to the respondents; and also that they had the same rights against the trustee of the insolvent firm as they had against the firm itself. Osler, J., whilst agreeing that the respondents dealt directly with

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the firm, examined the case on the contrary hypothesis, and held that, even in that view, the receipts were validated by the Bank Act, and carried the property of the timber to the respondents.

In the Courts below, the appellant pleaded that the provisions of the Bank Act with respect to warehouse receipts, in so far as they differ from the provisions of the Mercantile Amendment Act, were ultrà vires of the Dominion Legislature. The plea was not discussed, because it was admittedly at variance with the decision of the Supreme Court of Canada in *Merchants' Bank of Canada* v. *Smith* (1), which was a precedent binding on provincial tribunals. The case was therefore disposed of by the Chancellor and the Appeal Court upon the footing that the provisions of the Bank Act were not open to challenge.

At the first hearing of this appeal, the whole points arising in the case were fully and ably argued by counsel, with the exception of the plea taken by the appellant against the validity of the Dominion Act. Further discussion at the time was prevented by the *Labrador Case,* which had been specially set down for the consideration of a full Board.

Their Lordships, having considered the argument which had been addressed to them, came to the conclusion that the majority of the learned judges were right in holding that, notwithstanding the form of the documents by which it was carried out, the arrangement made in June, 1888, by Alexander Christie and Mr. Buchanan was one between the respondents and the firm, as well as between them and Peter Christie.

It does not admit of doubt that the advances obtained from the bank were intended to be for the use and benefit of the firm. Although the promissory notes were signed by his father as representing Peter Christie, it is clear that they were signed for the accommodation of the firm, and that, in any question between him and the firm, Peter Christie was a mere surety. In a question with the respondents he was, no doubt, the primary debtor; but the firm, as indorsers of the promissory notes, were also under a direct liability to the respondents, for which security might be given. And it is a material circumstance that the evidence of Alexander Christie, which has already been cited, is

(1) 8 Sup. Ct. Can. 512; 1 Cart. 828.

only consistent with the view that the firm undertook to give the respondents the security of the timber. The whole course of dealing between the parties is also consistent with that view. The advances appear to have been paid over to the firm, and the warehouse receipts for the timber to have been delivered by the firm to the respondents; and it does not appear that either the money or the receipts ever passed or were intended to pass into the possession of Peter Christie.

Their Lordships also came to the same conclusion with the majority of the learned judges, that, assuming the provisions of the Bank Act to be intrà vires, the receipts in question were such as the firm could give and the respondents could lawfully receive. The obvious effect of sect. 54 is that, for the purposes of the Bank Act, a warehouse receipt by an owner of goods who carries on, as the firm did, the trade of a saw-miller, is to be as effectual as if it had been granted by his bailee, although his business may be confined to the manufacture of his own timber. That enactment plainly implies that such a receipt is to be valid, not only in the hands of the bank, but in the hands of a borrower who gives it to the bank in security of a loan. Their Lordships do not think that the provisions of sect. 53, sub-sect. 2, which are somewhat obscure, can be held to cut down the plain enactments of sect. 54, especially in a case where the grantor of the receipt himself delivers it to the bank as a security for his own debt.

It seems clear that the firm, so long as they were solvent, could not have refused to make delivery of all the timber in their possession to the respondents, although the legal ownership was still with the firm. But on that assumption, and assuming also that their trustee had no higher right than the insolvents, the question remains whether a creditor having an assignment from the trustee could plead the nullity enacted by c. 125 of the Revised Statutes. Their Lordships, before dealing with these questions, thought it expedient to determine for themselves whether the provisions of the Bank Act, to which the appellant takes exception, were competently enacted.

The appellant's plea against the legislative power of the Dominion Parliament was accordingly made the subject of further argument; and, the point being one of general importance, their Lordships had the advantage of being assisted, in the hearing and consideration of it, by the Lord Chancellor and Lord Macnaghten. The question turns upon the construction of two clauses in the British North America Act, 1867. Sect. 91 gives the Parliament of Canada power to make laws in relation to all matters not coming within the classes of subjects by the Act exclusively assigned to the legislatures of the provinces, and also exclusive legislative authority in relation to certain enumerated subjects, the fifteenth of which is "Banking, Incorporation of Banks, and the Issue of Paper Money." Sect. 92 assigns to each provincial legislature the exclusive right to make laws in relation to the classes of subjects therein enumerated; and the thirteenth of the enumerated classes is "Property and Civil Rights in the Province."

Statutory regulations with respect to the form and legal effect, in Ontario, of warehouse receipts and other negotiable documents, which pass the property of goods without delivery, unquestionably relate to property and civil rights in that province; and the objection taken by the appellant to the provisions of the Bank Act would be unanswerable if it could be shewn that, by the Act of 1867, the Parliament of Canada is absolutely debarred from trenching to any extent upon the matters assigned to the provincial legislature by sect. 92. But sect. 91 expressly declares that, "notwithstanding anything in this Act," the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority. To refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian Parliament. For example, among the enumerated classes of subjects in sect. 91, are "Patents of Invention and Discovery," and "Copyrights." It would be practically impossible for the Dominion Parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the provinces.

This is not the first occasion on which the legislative limits

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laid down by sects. 91 and 92 have been considered by this Board. In *Cushing* v. *Dupuy* (1) their Lordships had before them the very same question of statutory construction which has been raised in this appeal. An Act relating to bankruptcy, passed by the Parliament of Canada, was objected to as being ultrà vires, in so far as it interfered with property and civil rights in the province; but, inasmuch as "bankruptcy and insolvency" form one of the classes of matters enumerated in sect. 91, their Lordships upheld the validity of the statute. In delivering the judgment of the Board, Sir Montague Smith pointed out that it would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property.

The law being so far settled by precedent, it only remains for consideration whether warehouse receipts, taken in security by a bank in the course of the business of banking, are matters coming within the class of subjects described in sect. 91, sub-sect. 15, as "Banking, Incorporation of Banks, and the Issue of Paper Money." If they are, the provisions made by the Bank Act with respect to such receipts are intrà vires. Upon that point their Lordships do not entertain any doubt. The legislative authority conferred by these words is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers. It extends to the issue of paper currency, which necessarily means the creation of a species of personal property carrying with it rights and privileges which the law of the province does not, and cannot, attach to it. It also comprehends "banking," an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker.

The appellant's counsel hardly ventured to dispute that the lending of money on the security of goods, or of documents representing the property of goods, was a proper banking transaction. Their chief contention was that, whilst the legislature of Canada had power to deprive its own creature, the bank, of privileges enjoyed by other lenders under the provincial law, it had no power to confer upon the bank any privilege as a lender which the provincial law does not recognise. It might enact that a security, valid in the case of another lender, should be invalid in the hands of the bank, but could not enact that a security should be available to the bank which would not have been effectual in the hands of another lender. It was said in support of the argument, that the first of these things did, and the second did not, constitute an interference with property and civil rights in the province. It is not easy to follow the distinction thus suggested. There must be two parties to a transaction of loan; and, if a security, valid according to provincial law, was made invalid in the hands of the lender by a Dominion statute, the civil rights of the borrower would be affected, because he could not avail himself of his property in his dealings with a bank.

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(1) 5 App. Cas. 409.

But the argument, even if well founded, can afford no test of the legislative powers of the Parliament of Canada. These depend upon sect. 91, and the power to legislate conferred by that clause may be fully exercised, although with the effect of modifying civil rights in the province. And it appears to their Lordships that the plenary authority given to the Parliament of Canada by sect. 91, sub-sect. 15, to legislate in relation to banking transactions is sufficient to sustain the provisions of the Bank Act which the appellant impugns.

On these grounds, their Lordships have come to the conclusion that the judgments appealed from ought to be affirmed, and they will humbly advise Her Majesty to that effect. The appellant must bear the costs of this appeal.

Solicitors for appellant: *Harrison & Powell.*

Solicitors for respondents: *Freshfields & Williams.*

[PRIVY COUNCIL.]

J. C.* BLACK . . . . PLAINTIFF;

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AND

Nov. 29, 30; Dec. 16

THE CHRISTCHURCH FINANCE COMPANY, LIMITED . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Master and Servant—Liability of Employer—Wrongful act of Servant within scope of his Employment.

Held, that the defendant company was liable in damages for the act of its contractor in negligently and improperly lighting a fire on its land, and permitting it to spread to the plaintiff's lands; even though such contractor in so doing disregarded special stipulations contained in such contract relative to the time at which such fire should be lit.

To escape liability the defendant must shew that the act of the contractor was that of a trespasser, and was not within the scope of his contract.

APPEAL from a decree of the Court of Appeal (Oct. 19, 1891), reversing a decree of Denniston, J. (July 15, 1891), which gave judgment for the appellant for £1600, the agreed amount of damages.

The facts and proceedings in the suit are stated in the judgment of their Lordships.

Ollivier, for the appellant, contended that this reversal was wrong. The respondent was liable for the damages which had ensued, though caused by the wrongful act of its contractor. The lighting of the fire was part of the work which the contractor had undertaken. The contract did not fix a definite time for the burning, only that it should be a favourable time, which was left to the discretion of the contractor, though the month of February was suggested. For the purpose of fixing the time the contractor was to remain on the land. Even if the contract had fixed the time, and the contractor had lighted the fire at some

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* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, and SIR RICHARD COUCH.

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other time, still that circumstance would not have exonerated the respondent. The company neglected to provide in the contract for any precautions being taken to prevent damage to neighbouring properties. The fire was lighted under improper and dangerous conditions, in violation of the duty of the respondent, which was to see that it was so lighted as not to cause damage to neighbouring properties. As to the construction of the words "about February," see *Reg.* v. *The Inhabitants of St. Paul* (1). Of the cases cited in the Court below, *Bower* v. *Peate* (2) and *Dalton* v. *Angus* (3) are not much in point; but *Hughes* v. *Percival* (4) is a strong case in the appellants' favour. See also *Hole* v. *Sittingbourne and Sheerness Railway Company* (5) and *Limpus* v. *London General Omnibus Company* (6) as to the general scope of servants' duty.

Jelf, Q.C., and *Danckwerts*, for the respondent, contended that the Appeal Court was right. The question was narrowed down to the question of Nyman's position under the contract. The master is only liable for the acts of his sub-contractor if such acts of the latter were authorized by him, and are wrongful by reason of excess or mistake on the servants' part. Here the master did not authorize a burning in December; it was not excess of duty or mistake on the part of the servant; it was the wrongful doing of an unauthorized act. The company could not reasonably have anticipated that their contractor would have acted as he did, and was, therefore, not bound to guard against it. See *Pearson* v. *Cox* (7) as to a merely casual act by a servant which could not be reasonably foreseen. And as to the expression "about February" and its effect, see *Morris* v. *Levison* (8). The employer is not liable if the contractor does something essentially different from what he was employed to do: see *Bower* v. *Peate* (9); *Dalton* v. *Angus* (3); *Ellis* v. *Sheffield Gas Consumers' Company* (10). The respondent owed no duty to the

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(1) 14 L. J. (M.C.) 109.
(2) 1 Q. B. D. 321.
(3) 6 App. Cas. 740.
(4) 8 App. Cas. 443.
(5) 6 H. & N. 488.
(6) 32 L. J. (Ex.) 34.
(7) 2 C. P. D. 369.
(8) 1 C. P. D. 155.
(9) 1 Q. B. D. 327.
(10) 2 E. & B. 767.

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appellant in respect of the fire: *Gray* v. *Pullen* (1); *Pickard* v. *Smith* (2).

Ollivier was not heard in reply.

The judgment of their Lordships was delivered by

LORD SHAND:—

On the 23rd of December, 1890, a fire was lighted on certain uncleared land, the property of the respondents, and extended to the adjoining land of the appellant, and there destroyed property of the admitted value of £1600. This action was brought by the appellant against the respondents for the recovery of the damage thus sustained, and the appellant obtained a judgment for the sum of £1600 from Denniston, J., before whom the case was tried, but this judgment was reversed by the Court of Appeal.

The ground of the plaintiff's claim is that the defendants lighted or caused or procured the fire to be lighted on their own land in a negligent and improper manner, and wrongfully and negligently permitted the fire to spread to the lands of the plaintiff, with the result that the injury complained of was done to the plaintiff's growing crops of grass-seed, and fences and firewood. The defence was a denial of the plaintiff's allegations, and it was further alleged that the defendants did not authorize or empower any person to light or cause or procure to be lighted the fire which did damage to the plaintiff.

The trial took place before Denniston, J., on the 16th of June, 1891. Unfortunately the only question which was left to the jury was whether the fire which caused the damage had been lighted by a man named Nyman. This they answered in the affirmative, and the learned judge reserved further consideration of the case. Afterwards on the hearing of a motion by the plaintiff that judgment should be entered for him for the damages found due upon "the finding of the jury, the admissions of the parties, and the judge's notes of evidence," and a counter motion by the defendants for a new trial on the ground "that the finding of the jury is so defective that the judge cannot give judgment upon it," His Honour on the 15th of July, 1891, delivered decree in the plaintiff's favour. His judgment explains the course which the trial took, and the reasons which induced him to ask the jury the limited question already mentioned, and it seems to be essential in the determination of the present appeal to keep in view the account thus given of what occurred at the trial. His Honour said that—

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(1) 5 B. & S. 970.

(2) 10 C. B. (N.S.) 470.

"At the trial it was proved by written agreement, produced and put in evidence, that the defendant company had contracted with one Wright to clear and burn the bush on land belonging to the defendant company. Wright swore that, at the request of the defendant, and on its behalf, he had let the felling and burning of an additional piece of bush to one Nyman. This was not disputed at the trial. Neither of these questions could be said to have been in issue in the sense of being in doubt or dispute. The real and only dispute at the trial was, as to whether or no Nyman was the man who was seen on the evening of the 23rd of December lighting the fire in the company's bush, which undoubtedly spread into the plaintiff's land and did the injuries complained of. The defendant called no evidence, and in charging the jury I told them that there was only one question in dispute so far as the facts were concerned, and I proposed to submit only one to them; and that as there were questions of law involved, I would leave them to answer a specific issue, and reserve the law points for after discussion. No objection was made to my charge. The jury found, as they could not avoid finding, that Nyman had lit the fire. No other issue was asked to be put to the jury by the defendant's counsel. There was never any doubt that, in lighting the fire, Nyman did so in his capacity of contractor or sub-contractor. It is not suggested that he did it for amusement or maliciously. Indeed, in the present argument, Mr. Joynt himself suggested that no one would dispute that his real object was to get the work done as early as possible, so as to get the contract money. The legal consequence of his having so lit the fire is another matter, but it is clear that, after the finding of the jury, no dispute as to the facts can exist, and the only question left is one purely of law."

In the view which the learned judge took of the law the question really turned on the meaning and effect of the contract by which the defendants devolved the operations of clearing and burning the bush on Wright the contractor, and which was in these terms,—

"Contract, dated the 15th of July, 1890.

"Joseph Wright with the Christchurch Finance Company, Limited.

"I hereby contract with you for the falling and burning of bush on Section No. 31,438, in the following manner:—

"I will fall bush, scrub, saplings, and briars on the land, up to the size of 18 inches in diameter, about one foot from the ground, with the exception kounini, broadleaf, and eno, which I will strip of all limbs, and agree to burn everything up to the size of six inches in diameter, and I will start falling within three days from this date, and complete the falling by November the 30th, 1890, and burn in a favourable time about February next. I to take all responsibility connected with burning off the bush, and all damages arising therefrom are to be made good and borne by me alone. The boundary being about two chains south of creek, and joining Mr. Black's fences on other boundaries, and that you should pay me 30/- per acre for falling and burning in the aforesaid manner, and the payments to be as follows:—2/3 payable on bush being fell, and the balance of contract paid on Mr. Belmer's certificate of completion.

"I to have the firewood at a royalty of 3/- per cord, and right to make road through the reserve to enable me to haul my timber to the main road."

The defendants appealed against Denniston, J.'s, judgment, and by their notice of appeal they intimated that they would move the Court of Appeal "to set aside the judgment given for the respondent, by the Supreme Court at Christchurch, on the 15th day of July, 1891, and to enter up judgment for the defendant, with costs, on the grounds shewn by the statements of claim and defence, and by the admission evidence and finding at the hearing in the said Supreme Court."

This notice of appeal, it will be observed, did not again ask for a new trial, but invited the Court to dispose of the case on the record, and the admission evidence and finding at the hearing of the case by Denniston, J., as that learned judge had himself done.

Although the verdict given at the trial was an answer to one question only, and that a question the answer to which taken alone could not afford a solution of the legal point of the defendants' liability, the Court of Appeal has entertained and disposed of the case on the view that the judgment of Denniston, J., fully explains the course which the trial took, and that judgment should accordingly be given on the evidence and the admissions, as the defendants asked by their notice of motion. Taking this view, the Court of Appeal have concurred with Denniston, J., in holding that the decision of the case depends on the terms of the contract entered into between the company and Wright, as to the legal effect of which however they have arrived at a different result. The defendants' counsel proposed in the event of their Lordships differing from the judgment of the Appellate Court that the case should still be remitted back to have a new trial on certain points on which they maintained the proof was not clear, but their Lordships are clearly of opinion, having regard to the course taken before the Courts below, that the appeal should be now disposed of as depending on the contract already referred to, in the light of the facts as these have been found or accepted as proved in the judgments of the Courts below. In this view it appears to their Lordships that the act of Nyman in setting fire to the bush on the Defendants' land must be regarded as the act of the contractor. Denniston, J., expressly says with reference to what occurred at the trial:—"No other issue was asked to be put to the jury by the defendants' counsel. There was never any doubt that in lighting the fire, Nyman did so in his capacity of contractor or subcontractor," and the learned judges in the Court of Appeal have proceeded on substantially the same view of the result of the evidence and of what occurred at the trial on this point.

The case does not raise any general question of law, but seems to involve only the question whether the defendant company under the special terms of their contract are responsible for the

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act of Nyman in setting fire to the bush at a time when admittedly, with a north-west wind blowing, his act was attended with great risk of damage to the plaintiff's property. It has not been disputed that if Nyman in what he did was acting under the defendants' contract, by which the burning of the bush had been let or contracted for, the defendants must be responsible for the consequences. The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property (sic utere tuo ut alienum non lædas). And if he authorizes another to act for him he is bound, not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences. See *Hughes* v. *Percival* (1) and authorities there cited. Cases may indeed occur in which no precautions could be adopted which could reasonably be expected to avert the danger, of which the present appears to be a pretty clear instance, for it is scarcely conceivable that when once the fire was lit, not at a suitable or favourable time, but with the wind blowing as it was, any means which could be suggested would have saved the consequences which occurred. In any view no preventive means of any kind were adopted, and there can be no doubt as to the liability of the defendants if they are responsible for Nyman's act.

Conflicting views have been taken by Mr. Justice Denniston on the one hand, and the Court of Appeal on the other, as to the effect of the contract with Wright which was entered into on the 15th July, 1890. The fire took place on the 23rd December following. The Court of Appeal has held that a fire on that date, or on any date earlier than would be fairly covered by the words "about February next," could not be regarded as under the contract, and accordingly reversed the judgment of Mr. Justice Denniston in the plaintiff's favour.

The contract was made expressly for the "falling and burning" of the bush on the defendants' land. It proceeds in its second

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(1) 8 App. Cas. 443.

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sentence to specify what the contractor is to fall, and what he is to burn. "I will fall bush scrub saplings and briars on the land,' &c., "and agree to burn everything up to the size of six inches in diameter." It then proceeds "and I will start falling within three days from this date and complete the falling by November the 30th, 1890, and burn in a favourable time about February next." Thus in three instances in the earlier part of the document the falling and burning of the bush are treated together as parts of one general operation for the clearance of the ground. There follows a clause by which the contractor agrees to take all responsibility connected with burning off the bush and all damages arising from this. The price is then fixed at a lump sum of 30*s.* per acre "for falling and burning," two-thirds to be paid on bush being "fell," and the balance paid on certificate of completion. The contract contains a further term that the contractor is to have the firewood at a royalty of 3*s.* per cord, and right to make a road through the reserve to enable him to haul his timber to the main road.

The contract taken as a whole is one for the clearance of the ground of all growing bush and timber, to be effected by the consecutive operations of felling and burning. It is stipulated that the first of these operations shall be begun at once, and concluded by the end of November following. Then follow the words on which the judgment of the Court of Appeal proceeds, "and burn in a favourable time, about February next." It is said that the specification of time to burn "about February next" has the practical effect of separating the operations of felling and burning so completely as really to create two contracts, though for a lump payment, and that the contractor, if he went on the land sooner than "about February" to light the bush, was to be regarded in the present question in the same way as an intruder or a stranger for whose act the defendant company would have no responsibility. Their Lordships are unable to agree with this view of the contractor's position. The contract bound the contractor "to burn in a favourable time." It cannot be suggested that if he had violated this condition only of his contract, the defendants would have escaped responsibility. Having authorized and entrusted the operation of burning to another they must answer for his proceedings, however much he may have violated their instructions or the detailed conditions of his contract with them. Their Lordships agree in the observation of Mr. Justice Denniston when he says with reference to the act of Nyman, "I cannot distinguish between the legal consequences of lighting a fire at an improper time and of lighting it in an improper manner." In the present case the clearing of the land was authorised by a contract for felling and burning. It no doubt contained a stipulation that an interval should elapse between the two operations, presumably in order that the bush cut should be thoroughly dried so that the burning should be as complete as possible. It is not easy to say why "about February" should have been specified as the time of burning, for there is some evidence that the cocksfoot harvest which would be endangered is usually going on throughout that month. It may have been in order to secure a sufficient interval after the felling, which was to be completed not later than by the end of November, or because it was desired to have the ground fully cleared about February. But assuming that there was a violation of the terms of the contract on the contractor's part in burning so early as the end of December this cannot in their Lordships' opinion affect the defendants' liability to third parties injured by the act of their contractor. It is clear that the contractor had the right under his contract to be on the ground from time to time as he thought fit, until the whole operations were completed for felling, for clearing away the timber he was entitled to remove, for making a road to enable him to do so, and for the burning of the bush. Their Lordships cannot adopt the view that the contracts for felling and for burning the bush are to be regarded as in any proper sense separate or independent, and that the separate contract to burn the bush did not come into operation until about February. There was but one contract, to fell and to burn, that is to clear the land, and though the contractor disregarded the stipulation which the defendants made with him as to the time of burning, this cannot relieve them from responsibility. The defendants might have stipulated that an interval of two months should elapse after the time of felling and before the burning should take place. If the contractor having leave under his contract to be on the land had allowed a shorter interval only, it could not be said he was a trespasser when he lighted the fire, so that the defendants would not be liable for his act. So also if the contractor disregarded or violated stipulations as to the manner of lighting, or the place at which the fire should be lit. Their Lordships are unable to draw any distinction in legal principle between such cases and the present in which the condition related to the time at which the fire was to be lighted.

Their Lordships will humbly advise Her Majesty to reverse the judgment of the Court of Appeal, and to restore the judgment of Denniston, J. The defendants will pay the costs of the appeal to the Appellate Court and of the present appeal.

Solicitors for appellant: *A. R. & H. Steele.*
Solicitors for respondent: *Henry Kimber & Co.*

Principles applied. NOOR NOHAMED *v.* R. [1949] 1 All E.R. 365.

Considered. NOOR MOHAMED *v.* THE KING. [1949] A. C. 182

[PRIVY COUNCIL.]

JOHN MAKIN AND SARAH MAKIN, HIS WIFE . . . . APPELLANTS;

AND

THE ATTORNEY-GENERAL FOR NEW SOUTH WALES . . . . RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Applied. HARRIS *v.* DIRECTOR OF PUBLIC PROSECUTIONS [1952] A.C. 694

Law of New South Wales—Criminal Law Amendment Act of 1883, s. 423—*Admissibility of Evidence—Evidence of Criminal Acts other than those Charged.*

Evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment is not admissible unless upon the issue whether the acts charged against the accused were designed or accidental, or unless to rebut a defence otherwise open to him.

Where prisoners had been convicted of the wilful murder of an infant child which the evidence shewed they had received from its mother on certain representations as to their willingness to adopt it, and upon payment of a sum inadequate for its support for more than a very limited period, and whose body the evidence shewed had been found buried in the garden of a house occupied by them, *held*, that evidence that several other infants had been received by the prisoners from their mothers on like representations and on like terms, and that bodies of infants had been found buried in a similar manner in the gardens of several houses occupied by the prisoners, was relevant to the issue which had been tried by the jury.

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* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HALSBURY, LORD ASHBOURNE, LORD MACNAGHTEN, LORD MORRIS, and LORD SHAND.

Held, that sect. 423 of the Criminal Law Amendment Act of 1883 (46 Vict. No. 17) does not on its true construction empower the Court to affirm a conviction where the evidence submitted to the jury was inadmissible and may have influenced the verdict.

THIS was a petition by John and Sarah Makin for special leave to appeal from a judgment of the Supreme Court (March 30, 1893), whereby a verdict of guilty had been sustained on a special case stated, which verdict had been found on an indictment charging that they on the 29th of January, 1892, at Redfern, did murder (1.) Horace Amber Murray, (2.) a certain male infant whose name was unknown.

Four points had been reserved by the judge at the trial, as stated in the judgment of their Lordships, one of which was abandoned and the other three decided in favour of the Crown.

The special case contained the following statement: "On the 9th of November some constables found the remains of four infants in the back yard of 109, George Street, among which was the body of a male child, from two to nine weeks old. It was clothed with a long white baby's gown and underneath a baby's small white shirt, both of which were identified as being the gown and shirt in which Murray's baby had been dressed. A minute portion of the infant's hair resembled the hair of Murray's child. Previous to the finding of the four infants in George Street, Redfern (on the 9th of November), two bodies of infants had been discovered, one on the 11th and the other on the 12th of October, on the premises in Burren Street, McDonaldtown, where the prisoners had, it appears, resided from the end of June until about the middle of August. During the adjournment of an inquest on one of those bodies held in October, the prisoner Sarah came to her former residence in George Street, Redfern, and said to witness, then residing there, that she had called to see about those people that had lived there before her, that she was a great friend of theirs, and asked if the police had dug the yard up, and further asked if any bodies had been found in the yard. At this inquest both prisoners were examined, no charge at that time having been made against them. They both swore that the only child that they had ever received to nurse was the one which they had in Burren Street, and which was given them after they arrived there. The prisoner Sarah swore that none but her own family had removed from George Street, to Burren Street. On the 2nd of November one, and on the 3rd four more bodies were discovered buried in Burren Street, and on the 3rd of November the prisoners were arrested. On the night of that day prisoner John was placed in a cell with a witness, who deposed that prisoner said to him that he (Makin) was there for baby-farming, that there were seven found and there was another to be found, and when that was found he would never see daylight any more; that is what a man gets for obliging people, and that he could do nothing outside as they were watching the ground too close; that there was no doctor could prove that he ever gave them anything, that he did not care for himself, but that his children were innocent. On the 12th of November the bodies of two infants, bones only, were found on the premises of Levy Street, Chippendale, where prisoners had resided some time previous to their residence in Kettle Street." The prisoners had moved from Kettle Street to George Street, and thence to Burren Street.

Fullarton, Q.C., on the 1st of July, appeared in support of the petition, contending that, although the Court was unanimous in sustaining the conviction, yet considerable difference of opinion had been expressed by the judges on an important general question which the judges themselves had desired to have settled in *McLeod* v. *Attorney-General for New South Wales* (1), but that case was disposed of on a point of jurisdiction. The question was whether, assuming evidence to have been improperly admitted, the conviction should be upheld if the Court considered the remaining evidence sufficient to sustain it. The evidence admitted in this case of other crimes was not relevant to the issue as to the crime charged. Evidence was admitted as to finding bodies of children elsewhere, which bodies were not shewn to have been bodies of children committed to the care of the prisoners.

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(1) [1891] A. C. 455; see also 11 N. S. W. L. R. 218.

Sir *E. Clarke,* Q.C., *Poland,* Q.C., *Cluer,* and *R. H. Long Innes,* for the Attorney-General, assented to the appeal being heard, and the appeal was fixed for the 17th, no printed cases to be lodged, on which day

Fullarton, Q.C., and *Cunynghame,* for the appellants, contended that evidence as to finding of bodies other than the body the subject of the issue to be tried, and the evidence of the five women to the effect that they had intrusted other children to the prisoners, which children had never been seen again, was inadmissible and vitiated the verdict. The general rule and practice of the Courts in criminal cases confined the evidence strictly to direct evidence of the commission of the particular act charged, and excluded evidence of similar acts committed, or supposed to have been committed, by the same prisoner on other occasions, not as being wholly irrelevant, but as inconvenient and dangerous. To admit this latter class of evidence was apt to take the prisoner by surprise, and raised issues as to other alleged acts, which were confused with the true issue, and which tended both to confuse and unduly to prejudice the jury. The rule in cases of forgery and of receiving stolen goods was an exception to the general rule for special reasons, and should not be extended: per Lord Campbell, C.J., in *Reg.* v. *Oddy* (1); *Reg.* v. *Winslow* (2). The strictly limited extension of this exception by 34 & 35 Vict. c. 112, s. 19, only proved the rule; but for which the statute would not have been necessary. Even in forgery cases such evidence is only admitted after proof of the actual uttering of forged notes or base coin by the prisoner, and where the only issue left is as to the guilty intent, there being in these cases no presumption of guilty knowledge or intent; but in murder this presumption is made by law upon mere proof of the killing. In this case, moreover, there is no proof of the

(1) 2 Den. C. C. R. 269, 272.

(2) 8 Cox, C. C. 379, 397.

killing; the evidence objected to is introduced to induce the jury to believe the prisoners killed the child the subject of indictment, and not merely to prove a felonious killing. In *Reg.* v. *Geering* (1) there was already strong evidence of the poisoning; the evidence was admitted to prove guilty intention. Otherwise it is opposed to *Reg.* v. *Oddy* (2) and *Reg.* v. *Winslow* (3). *Reg.* v. *Garner* (4) is for us as to the evidence excluded; where against us it is bad law, and disapproved by Stephen, J., who was counsel for the Crown. He also disapproves of *Reg.* v. *Gray* (5). Then there is no identification of any of the bodies except the one which is the subject of indictment. Even if the cases in George Street and Burren Street were admissible, the Levy Street evidence was wrongly admitted. There was no proof that any children had ever been in the keeping of the prisoners before or in Levy Street, and nothing to connect them with the remains found there. Reference was made to *Reg.* v. *Oddy* (2); *Reg.* v. *Geering* (1); *Reg.* v. *Winslow* (6); *Reg.* v. *Holt* (7); *Reg.* v. *Fuidge* (8); *Reg.* v. *Hall* (9); *Reg.* v. *Taylor* (10); *Rex* v. *Dossett* (11); *Reg.* v. *Harris* (12); *Reg.* v. *Rearden* (13); *Reg.* v. *Richardson* (14); *Reg.* v. *Crickmer* (15); *Reg.* v. *Garner* (4); *Reg.* v. *Gray* (16); *Reg.* v. *Cotton* (17); *Reg.* v. *Roden* (18); *Reg.* v. *Heesom* (19); *Reg.* v. *Flannagan* (20). In civil cases all the instances of admitting evidence beyond what is strictly relevant to the issue are exceptional: see *Holcombe* v. *Hewson* (21); *Hollingham* v. *Head* (22); *Barden* v. *Keverberg* (23); *Viney* v. *Barss* (24); *Balcetti* v. *Serani* (25); *Thompson* v. *Mosely* (26).

(1) 18 L. J. (N.S.) (M.C.) 215.
(2) 2 Den. C. C. R. 269, 272; S. C. 5 Cox, 210.
(3) 8 Cox, C. C. 379, 397.
(4) 4 F. & F. 346.
(5) Stephen, Dig. Evidence, 19.
(6) 8 Cox, C. C. 397.
(7) 8 Cox, 411.
(8) 33 L. J. (M.C.) 74.
(9) 5 N. Z. L. R., Court of Appeal, 93, 108.
(10) 5 Cox, 138.
(11) 2 C. & K. 306.
(12) 4 F. & F. 342.
(13) 4 F. & F. 76.
(14) 2 F. & F. 343.
(15) 16 Cox, 701.
(16) 4 F. & F. 1102.
(17) 12 Cox, 400.
(18) 12 Cox, 630.
(19) 14 Cox, 40.
(20) 15 Cox, 403.
(21) 2 Camp. 391.
(22) 27 L. J. (C.P.) 241.
(23) 2 M. & W. 61.
(24) 1 Esp. 292.
(25) 1 Peake, 192.
(26) 5 C. & P. 501.

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Assuming the evidence, or any part of it, to have been inadmissible, its reception vitiated the verdict: see *Reg.* v. *Gibson* (1). A substantial wrong was done to the prisoners, for it was the duty of the judge to see that they were tried only upon legal evidence. It is mere matter of speculation whether the jury would have convicted in the absence of the evidence impugned, and to sustain the conviction in its absence is not to uphold the verdict of the jury but to substitute the verdict of the Court. Sect. 423 of 46 Vict. No. 17, was not intended to affect this fundamental principle in the administration of the criminal law. The proviso cannot, on its true construction, be held to warrant the transfer of the functions of the jury who heard the evidence to the judge who did not; for that would be a substantial wrong within the words used. Its meaning is satisfied by confining its operation to cases other than misreception of evidence, or where the evidence erroneously admitted could not reasonably be supposed to have possibly affected the minds of the jury.

Sir *E. Clarke*, Q.C., *Poland*, Q.C., *Cluer*, and *R. H. Long Innes*, for the respondent, contended that the evidence in question was not wrongly received. With regard to the evidence as to the finding in Levy Street, that stood on a different footing from the evidence as to George Street and Burren Street. The strongest evidence, as regards admissibility, was that relating to George Street. The evidence of finding bodies other than the subject of indictment was of necessity admitted in that instance because they were all found at the same time and place. Then, in order to rebut the defence set up of bonâ fide intention to adopt and maintain and of accidental death, the evidence of the mothers of babies having delivered their children to the prisoners at similar places and under similar circumstances, including insufficiency of premium, was admissible. That brought in the evidence with regard to the finding of bodies at Burren Street, because the child of one of these mothers was traced to and seen at the house in Burren Street, but not seen elsewhere nor accounted for. All the children of the mothers called disappeared and were not

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(1) 18 Q. B. D. 537.

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heard of again since the prisoners left Burren Street, and the presumption arose that the bodies found were identical with those of the missing children unless the prisoners shewed to the contrary. The Levy Street evidence was admissible because the evidence with regard to the finding of the bodies at George Street and Burren Street, joined with the evidence of the mothers called, led to the inference that the prisoners had pursued a similar course of conduct for some time previously. Evidence was therefore admissible to support this inference by the recurrence of the unusual phenomena of bodies of babies having been buried in an unexplained manner in a similar part of premises previously occupied by the prisoners. They then examined the cases cited on the other side to shew that they did not contravene the above propositions. Reference was also made to *Reg.* v. *Garner* (1); *Queen* v. *Waters* (2). It was further contended that it was not merely in exceptional cases that evidence of the kind objected to was receivable. It was the general and not the exceptional rule of law to admit such evidence to rebut defence of accident, and to shew existence of motive and a systematic course of conduct. In short, it was contended that the result of the cases cited was to establish that any evidence is admissible of any acts or doings of the person accused if such acts or doings are so connected with the transaction under charge or are of a character so similar thereto as to lead to a reasonable inference that the prisoner committed the act charged, or at the least that such act if committed was wilful and not accidental.

With regard to the verdict being sustainable notwithstanding the exclusion of impugned evidence, reliance was placed on the proviso in s. 423 of Act 46 Vict. No. 17. It was intended to give to the Supreme Court the same power of reviewing a verdict in criminal trials in New South Wales which the superior Courts in England possess in civil cases. The words of the section have been taken exactly from rule 48 of the Judicature Act, 1873.

Fullarton, Q.C., replied.

(1) 3 F. & F. 681; S.C. 4 F. & F. 346.

(2) 72 Central Criminal Court Session Papers, p. 546, 565.

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1893. Dec. 12. The judgment of their Lordships was delivered by

THE LORD CHANCELLOR :— Lord Herschell LC.

The appellants in this case were tried and found guilty at the Sydney Gaol Delivery held at Darlinghurst of the murder of the infant child of one Amber Murray. The learned judge before whom the case was tried deferred passing sentence until after the argument of the special case which he stated for the opinion of the Supreme Court of New South Wales.

The points reserved by the learned judge were: first, that his honour was wrong in admitting evidence of the finding of other bodies than the body of the child alleged to be Horace Amber Murray; secondly, that his honour was wrong in admitting the evidence of Florence Risby, Mary Stacey, Agnes Todd, Agnes Ward, and Mrs. Sutherland; thirdly, that there was no evidence to prove the identity of the body marked D with that of Horace Amber Murray; fourthly, that there was no evidence of the death or cause of death of Horace Amber Murray, or that he was murdered.

The questions for the Court were, whether the evidence objected to was admissible, and if not, were the prisoners rightly convicted? and even if inadmissible, was there evidence sufficient to sustain the conviction? On the argument of the special case the third point was abandoned by the learned counsel for the prisoners. On the other points the judgment was in favour of the Crown.

Special leave was granted to appeal to this Board from the judgment of the Supreme Court of New South Wales, some of the questions raised being of grave and general importance.

At the close of the argument before their Lordships they intimated that they would advise Her Majesty that the appeal should be dismissed, and that they would state their reasons for this advice on a future occasion.

There can be no doubt, in their Lordships' opinion, that there was ample evidence to go to the jury that the infant was murdered. Indeed, that point was scarcely contested in the argument of the learned counsel for the appellants. The question which their Lordships had to determine was the admissibility of the evidence relating to the finding of other bodies, and to the fact that other children had been entrusted to the appellants.

In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.

The principles which their Lordships have indicated appear to be on the whole consistent with the current of authority bearing on the point, though it cannot be denied that the decisions have not always been completely in accord.

The leading authority relied on by the Crown was the case of *Reg.* v. *Geering* (1), where on the trial of a prisoner for the murder of her husband by administering arsenic evidence was tendered, with the view of shewing that two sons of the prisoner who had formed part of the same family, and for whom as well as for her husband the prisoner had cooked their food, had died of poison, the symptoms in all these cases being the same. The evidence was admitted by Pollock, C.B., who tried the case; he held that it was admissible, inasmuch as its tendency was to prove that the death of the husband was occasioned by arsenic, and was relevant to the question whether such taking was accidental or not. The Chief Baron refused to reserve the point for the consideration of the judges, intimating that Alderson, B., and Talfourd, J., concurred with him in his opinion.

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(1) 18 L. J. (N.S.) (M.C.) 215.

This authority has been followed in several subsequent cases. And in the case of *Reg.* v. *Dossett* (1), which was tried a few years previously, the same view was acted upon by Maule, J., on a trial for arson, where it appeared that a rick of wheat-straw was set on fire by the prisoner having fired a gun near to it. Evidence was admitted to shew that the rick had been on fire the previous day, and that the prisoner was then close to it with a gun in his hand. Maule, J., said: "Although the evidence offered may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable. In many cases it is an important question whether a thing was done accidentally or wilfully."

The only subsequent case to which their Lordships think it necessary to refer to specifically is that of *Reg.* v. *Gray* (2), where on a trial for arson with intent to defraud an insurance company, Willes, J., admitted evidence that the prisoner had made claims on two other insurance companies, in respect of fires which had occurred in two other houses which he had occupied previously and in succession, for the purpose of shewing that the fire which formed the subject of the trial was the result of design and not of accident. The learned judge after consulting Martin, B., refused to reserve the point for the consideration of the Court for Crown Cases Reserved. The fact that the learned judge took this course after consulting Martin, B., is important, because a decision of that learned judge was mainly relied on in opposition to the authorities to which attention has been drawn.

The case referred to is that of *Reg.* v. *Winslow* (3), which it certainly seems difficult to reconcile with *Reg.* v. *Geering* (4); but, in view of the circumstance to which attention has been called, it cannot be regarded as certain that Martin, B., deliberately dissented from the view which was adoped in *Reg.* v. *Geering* (4) and other cases.

(1) 2 C. & K. 306.
(2) 4 F. & F. 1102.
(3) 8 Cox, 397.
(4) 18 L. J. (N.S.) (M.C.) 215.

The learned counsel for the appellants placed much reliance on the case of *Reg.* v. *Oddy* (1), the only one which has been considered by the Court for Crown Cases Reserved. It was there held that on the trial of an indictment containing counts for stealing, and for receiving the property knowing it to be stolen, evidence of the possession by the prisoner of other property stolen some time before from other persons was not admissible upon the count for receiving with guilty knowledge, in respect of which alone it had been admitted by the recorder. Lord Campbell said that in his opinion there was no more ground for admitting the evidence under the third count (for receiving) than under the first or second (for stealing). Under the two latter, it would have been evidence of the prisoner being a bad man, and likely to commit the offence there charged. So under the third count the evidence would only shew the prisoner to be a bad man; it would not be direct evidence of the particular fact in issue. Alderson, B., in his judgment said that the evidence merely went to shew that the prisoner was *in possession* of other property which had been stolen in the previous December, and not that he had *received such property knowing it to be stolen*; that the mere possession of stolen property was evidence primâ facie, not of receiving, but of stealing, and to admit such evidence in the case before him would be to allow a prosecutor, in order to make out that a prisoner had *received* property with a guilty knowledge which had been stolen in March, to shew that the prisoner had in the December previously *stolen* some other property from another place, and belonging to other persons. In other words, they were asked to say that in order to shew that the prisoner had committed one felony, the prosecutor might prove that he committed a totally different felony some time before.

Their Lordships do not think that the judgments in *Reg.* v. *Oddy* (1) at all conflict with the judgment in *Reg.* v. *Geering* (2) and the other cases referred to.

Their Lordships do not think it necessary to enter upon a detailed examination of the evidence in the present case. The prisoners had alleged that they had received only one child to

(1) 2 Den. C. C. 265.

(2) 18 L. J. (N.S.) M. C. 215.

nurse; that they had received 10*s.* a week whilst it was under their care, and that after a few weeks it was given back to the parents. When the infant with whose murder the appellants were charged was received from the mother she stated that she had a child for them to adopt. Mrs. Makin said that she would take the child, and Makin said that they would bring it up as their own and educate it, and that he would take it because Mrs. Makin had lost a child of her own two years old. Makin said that he did not want any clothing; they had plenty of their own. The mother said that she did not mind his getting £3 premium so long as he took care of the child. The representation was that the prisoners were willing to take the child on payment of the small sum of £3, inasmuch as they desired to adopt it as their own.

Under these circumstances their Lordships cannot see that it was irrelevant to the issue to be tried by the jury that several other infants had been received from their mothers on like representations, and upon payment of a sum inadequate for the support of the child for more than a very limited period, or that the bodies of infants had been found buried in a similar manner in the gardens of several houses occupied by the prisoners.

In addition to the question whether the evidence objected to in the present case was admissible the learned judge (as has been stated) reserved for the opinion of the Supreme Court the further questions, whether, if not admissible, the prisoners were rightly convicted; and even if inadmissible, whether there was evidence sufficient to sustain the conviction.

These questions, and the point of law raised by them, were fully argued before their Lordships, and although their Lordships having arrived at the conclusion that the evidence was admissible it became unnecessary for the determination of the appeal to decide them, their Lordships think it right to state the opinion which they formed upon the important question of law involved.

It was considered by the Supreme Court of New South Wales in the case of *Reg.* v. *McLeod* (1), and led to a difference of

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(1) 11 N. S. W L. R. 218.

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opinion amongst the learned judges. That case was brought by appeal to this Board with the view of obtaining its opinion upon the point. The case was, however, determined by their Lordships upon other grounds. The point of law involved is, whether where the judge who tries a case reserves for the opinion of the Court the question whether evidence was improperly admitted, and the Court comes to the conclusion that it was not legally admissible, the Court can nevertheless affirm the judgment if it is of opinion that there was sufficient evidence to support the conviction, independently of the evidence improperly admitted, and that the accused was guilty of the offence with which he was charged.

It was admitted that it would not be competent for the Court to take this course at common law, but it was contended that sect. 423 of the Criminal Law (Amendment) Act, 1883 (46 Vict. No. 17) empowered, if even it did not compel the Court to do so. That section is in these terms:—

"The judge by whom any such question is reserved shall as soon as practicable state a case setting forth the same with the facts and circumstances out of which every such question arose and shall transmit such case to the judges of the Supreme Court who shall determine the questions and may affirm amend or reverse the judgment given or avoid or arrest the same or may order an entry to be made on the record that the person convicted ought not to have been convicted or may make such other order as justice requires. Provided that no conviction or judgment thereon shall be reversed arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice."

Reliance was of course placed upon the language of the proviso. It was said that if without the inadmissible evidence there were evidence sufficient to sustain the verdict, and to shew that the accused was guilty, there has been no substantial wrong or other miscarriage of justice. It is obvious that the construction contended for transfers from the jury to the Court the determination of the question whether the evidence—that is to say, what the law regards as evidence—established the guilt of the accused. The result is that in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury, but on the decision of the Court. The judges are in truth substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.

It is impossible to deny that such a change of the law would be a very serious one, and that the construction which their Lordships are invited to put upon the enactment would gravely affect the much cherished right of trial by jury in criminal cases. The evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence which might appear to the Court sufficient to support the conviction might have been reasonably disbelieved by the jury in view of the demeanour of the witnesses. Yet the Court might under such circumstances be justified or even consider themselves bound to let the judgment and sentence stand.

These are startling consequences, which strongly tend in their Lordships' opinion to shew that the language used in the proviso was not intended to apply to circumstances such as those under consideration.

Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them.

In their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court founded merely upon a perusal of the evidence. It need scarcely be said that there is ample scope for the operation of the proviso without applying it in the manner contended for.

Their Lordships desire to guard themselves against being supposed to determine that the proviso may not be relied on in

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cases where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury, as for example where some merely formal matter not bearing directly on the guilt or innocence of the accused has been proved by other than legal evidence.

Solicitors for the appellants: *Yeilding, Piper, & Tallack.*
Solicitor for the respondent: *Randolph C. Want.*

[HOUSE OF LORDS.]

H. L. (Sc.) JAMES MUIRHEAD . . . . APPELLANT;

1893

Nov. 17.

AND

THE FORTH AND NORTH SEA STEAMBOAT MUTUAL INSURANCE ASSOCIATION . . . . RESPONDENTS.

Insurance, Marine—Mutual Insurance Company—Articles of Association imported into Policy—Whether addition to Article not legally passed by the Company was a Condition of the Policy.

The pursuer insured his ship with the defenders, a mutual assurance association. The policy provided that the "provisions contained in the articles of association shall be deemed and considered part of this policy." Five years before the date of the policy the company, having full power under its articles of association to do so, resolved to alter, inter alia, one of its articles, by substituting these words for others: "That it shall be a condition of this insurance that the assured shall keep one-fifth" (of the value of such ship) "uninsured." This addition to the article was not confirmed by a special resolution passed in accordance with the Companies Act, 1862, ss. 50, 51; but it was registered, and printed with the articles on the back of each policy. The pursuer had also insured with another company, the result being that he had insured altogether for more than four-fifths:—

Held, affirming the decision of the Court of Session (20 Court Sess. Cas. 4th Series (Rettie), 442), that the irregularity in the procedure by which the article had been altered did not prevent it from being binding upon the pursuer, and that, the condition contained in such article having been broken, he was not entitled to recover upon the policy.

APPEAL from an interlocutor of the First Division of the Court of Session, Scotland (1), which affirmed the judgment of the Lord Ordinary.

James Muirhead, the appellant, raised this action against the Forth and North Sea Steamboat Mutual Insurance Association, the respondents, to recover the sum of £1000 upon a policy of insurance for one year from the 20th of February, 1891. The insured vessel was lost by perils insured against; but the respondents denied the right of the appellant to recover on the ground that he had broken a condition of one of the articles of

(1) 20 Court Sess. Cas. 4th Series (Rettie), 442.

association which was a part of the contract of insurance. The policy provided that "the said steamship, &c., for so much as concerns the assured by agreement between the assured and the company in this policy, are and shall be valued at £3750.... And it is mutually agreed between the assured and the company that without prejudice to the rights and remedies of the company against the said person or persons effecting this insurance, as a member or members of the company in respect of this assurance, the assured shall pay to the company, in lieu of premiums, all the sums and contributions which the company are entitled to call upon the said person or persons effecting this insurance, as a member or members of the company, to pay to the company in respect of this insurance according to the articles of association of the company, and that the provisions contained in the said articles of association shall be deemed and considered part of this policy, and shall, so far as regards this insurance, be as binding upon the assured as upon the person or persons effecting the insurance." This was on the face of the policy, and at the foot was printed in red ink, "See other side." On the back were the original articles of association from 67 to 89, and below these, "Alterations and additions to above rules conform to articles 31 and 89." Originally article 67 was: "The insurance shall be of iron and wooden steamboats, &c., and the sum insured on any one steamer shall not exceed one-half of its value, or such other sum, not exceeding £1000, as the directors may think prudent." Under "Alterations," &c., this appeared: "Rule 67. Expunge the words 'one-half of its value,' and read, 'the sum insured on any one steamer shall not exceed £1000, or such other sum as the directors may think prudent, but in no case to exceed four-fifths of the value of such steamer, including trawl gear; and it shall be a condition of this insurance that the assured shall keep one-fifth uninsured.'" Article 31 gave power to the majority of the members at a general meeting to alter the articles. Before the vessel was lost the respondents discovered that the appellant's steamship was also insured for £3000 in the Sunderland Insurance Company, at first on a declared value of £3750, afterwards raised to £5000. The appellant was informed that this constituted an over-insurance, taking the two policies together, of £250 over the declared value, £3750, and eventually the respondents demanded that the insurance should be reduced to four-fifths in accordance with article 67 as amended. As the Sunderland Company had a similar rule, the appellant proposed to do what that company had done, namely, to raise the declared value to £5000, which he said was the actual value of the vessel. This the respondents declined to do. The appellant alleged that nearly two months after this correspondence began the respondents claimed a call (29th of July, 1891) in lieu of a premium on the policy, and then, in the letter enclosing their receipt, on the 4th of August intimated that the policy was cancelled. On the 8th of October, 1891, the ship was lost. On the record, as originally framed, the appellant contended that he was not prevented from insuring to any extent with other insurance companies; and, also, that the condition had not been violated, as the real value of his ship was £5000.

On the 10th of March, 1892, the Lord Ordinary (Wellwood) gave judgment for the respondents, reserving to the appellant any claim competent to him for repayment of calls.

On appealing to the Inner House the appellant was allowed to amend his record by adding a plea that article 67 as amended formed no part of the articles of association, it having been illegally added thereto. It appeared that notification of the proposed alteration having been given on the 11th of January, 1886, the alteration, with others, was submitted at an ordinary general meeting on the 18th of January, 1886, and passed, and that immediately following the meeting, on the same day, an extraordinary meeting was held at which the alteration was confirmed. And the secretary was directed to have it with others indorsed upon all policies of insurance which should hereafter be issued by the company, and to have such alterations registered in terms of the Companies Act, 1862. The article in question was duly registered, and since the 20th of February, 1886, all policies issued had indorsed on the back the old articles of the company followed by the alterations where altered. The appellant became a member of the association in February, 1891.

On the 2nd of June, 1892, the First Division sent the case back to the Lord Ordinary to hear the new point, and on the

28th of that month the Lord Ordinary again gave judgment for the respondents. This judgment was affirmed by the First Division on the 21st of February, 1893 (1).

On appeal,

Nov. 14, 16, 17. *The Solicitor General for Scotland* (*Asher*, Q.C.), and *George Watt* (of the Scotch Bar), for the appellant:—

The only conditions of the policy are the articles of association. The alterations proposed by the articles not having been sanctioned by a special resolution passed in accordance with sects. 50 and 51 of the Companies Act, 1862, are ineffectual to bind the appellant. Moreover, both these insurance companies work together and have the same stipulation; therefore the appellant could not recover more than four-fifths. [They abandoned the point that the declared value in the policy was not conclusive after the following cases had been cited: *Bousfield* v. *Barnes* (2); *Bruce* v. *Jones* (3); *North of England Insurance Association* v. *Armstrong* (4).]

The Lord Advocate (*J. B. Balfour*, Q.C.), and *Salvesen* (of the Scotch Bar), for the respondents, were only heard on the question as to whether the appellant was insured for more than four-fifths, and whether he could have obtained more.

If the Sunderland Company had paid the £3000 the appellant would then say to the respondents, "I want £1000 from you." This would be more than four-fifths; and that there was more than one insurance effected might be kept secret. "Shall keep one-fifth uninsured" means shall not make any insurance with any one else of that remaining one-fifth.

George Watt, in reply.

LORD HERSCHELL, L.C.:—

This is an appeal from an interlocutor of the Inner House affirming an interlocutor of the Lord Ordinary assoilzing the defenders from the conclusions of the summons in an action brought to recover the sum of £1000 upon a policy of insurance. There is no question about the loss of the vessel insured, but the question arose whether, according to the terms and conditions of the policy, the assured was entitled to recover. Reliance was placed by the defenders upon an article which it was said contained a condition which was broken by the assured, and which, therefore, disentitled him to recover, the condition being that the assured should keep one-fifth of the value of the vessel uninsured.

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(1) 20 Court Sess. Cas. 4th Series (Rettie), 442.

(2) 4 Camp. 228.

(3) 32 L. J. (Ex.) 132.

(4) Law Rep. 5 Q. B. 244; see also *Irving* v. *Manning* (1 H. L. C. 287).

It appeared that before the action was brought a discussion had taken place with regard to an insurance with another company, the Sunderland Insurance Company. This policy was a policy for £1000 upon a vessel valued at £3750. In the Sunderland policy as at first effected the vessel was also valued at £3750 and there was an insurance of £3000. The attention of the assured was called to the fact that this constituted an over-insurance, inasmuch as the two insurances together exceeded the limit up to which it was alleged the assured was entitled to insure as between the present respondents and himself. On the face of the correspondence there is shewn no contest by the appellant that there had been this over-insurance; and when the action was brought the point really argued by the present appellant was not that there had not been this excess but that, according to the true construction of the article on which reliance was placed by the company, all that he was bound to do was to abstain from insuring with them for more than four-fifths of the value of the vessel, and that it was quite immaterial what insurances he might have with other companies. That and that alone, so far as I understand it, was the contest between the parties at the time when the action was brought.

Now, dealing with that matter first, it appears to me to be scarcely capable of argument that the contention of the appellant could be sustained. The article provides that "the sum insured on any one steamer shall not exceed £1000 or such other sum as the directors may think prudent, but in no case to exceed four-fifths of the value of such steamer including trawl gear; and it shall be a condition of this insurance that the assured shall keep one-fifth uninsured." It seems to me to be impossible to put any other construction upon those words than this, that he shall be his own insurer to the extent of one-fifth, so as to secure due attention and care on his part, and that it had not reference only to the transaction between himself and this company. That disposes of the question which was really in dispute when this action was launched.

But it was discovered in the course of the proceedings that, as was alleged, there had been certain irregularities in the manner in which this article had become one of the articles of association of the company, and it was contended, therefore, that it was in no way binding upon the assured, and that his policy was to be regarded as free altogether from this condition. An amendment of the pleadings was allowed to raise that point.

The policy no doubt provides that payment shall be made to the company in respect of this insurance according to the articles of association of the company, and that the conditions contained in the said articles of association shall be deemed and considered part of this policy. The argument on the part of the appellant is that the term "the articles of association" in the policy means those articles of association which have been validly brought into existence according to the provisions under which the company was constituted and which regulate its proceedings, that is to say, under the orginal articles of association; and that no added article which has not been validly added according to the provisions of the original articles can be an article of association, and that, therefore, not being an article of association, it is not one of the conditions incorporated in this policy. That is the argument on the part of the appellant.

The foundation of fact for that argument is that the 66th article of association provides that "the company may from time to time, by special resolution passed in accordance with the provisions of the Companies Acts, 1862 and 1867, or any subsisting statutory modification thereof, alter and make new provisions in lieu of or in addition to any of the regulations of the association contained in these articles." The Companies Act requires certain meetings to be held at a certain interval; and it is said that, although the company purported to alter its original articles of association by making the article upon which reliance is placed by the respondents, the statutory conditions were not complied with, and that it therefore never really did become an article of association of this company. Now it is not in dispute that, so far as the matter of fact is concerned, that is established. The requirements of the Companies Act were not complied with, and this new article of association was not made in accordance with those requirements, and therefore was not in that sense a valid article. The original article 67, which was altered by the new one, enabled the company to insure only to one-half of the value of the vessel; but it contained, on the other hand, no condition such as I have read, that the assured should keep one-fifth uninsured. The contention, therefore, on behalf of the appellant, is this: "Article 67 is the only article which can apply to my insurance; the insurance was within the powers and provisions of that article, and that article does not contain a condition which is obnoxious to my claim, and therefore my case stands."

If by the words "articles of association," in the policy of insurance, is to be understood articles of association which have been in accordance with the regulations of the company validly constituted, I think the appellant makes out his case. But I am unable to come to the conclusion that this is the true construction of the policy. If it were, it certainly would lead to some very strange results. It cannot be doubted that, although articles might not have been validly made according to the constitution of the company, yet nevertheless a person dealing with that company, on the faith that these were amongst the articles, would be entitled as against the company to treat them as binding. That is a well-established doctrine, wherever an article which has not by reason of some defect in procedure been validly constituted, is one which it was competent for the company to make. The assured, therefore, might have insisted upon binding the assurer to the provisions of an article which de facto had existed and had been registered, whatever defects there might be in it de jure; and, on the other hand, it is contended that, if there is any stipulation favourable to the company in any of those articles which, though de facto, amongst the registered articles, have not become articles, if I may say so, de jure, the assured may refuse to be bound by those provisions, and fall back upon the position that the articles which are inserted in the policy are those articles only which have been lawfully and properly made. Now that certainly would be a result in which one would be indisposed to acquiesce, unless one were compelled by the ordinary rules of construction so to construe this policy. I think one is not so compelled. The policy may well be, and ought as a business document to be, construed in this way: that by "the articles of association of the company," both parties must have intended those articles, which had in fact been registered, and were the registered articles of the company, whatever defects there might have been in the procedure according to the regulations by which the company was bound. I am of opinion, therefore, that this article, upon which the contest turns, was an "article of association of the company" within the meaning of the policy.

But then it is said (and this, I think, is something of an afterthought) that the condition was not broken, inasmuch as the vessel was insured altogether for only £4000, and she was really worth £5000; and, therefore, she was only insured for four-fifths of her value, and one-fifth was at the risk of the assured. I am not at all sure that that, as matter of proof, is open to the appellant; but it is unnecessary to consider that, because it is clear that, as between the parties to this action, the value of the vessel must be taken as £3750; and if she was insured for more than four-fifths of £3750, it appears to me that this condition was broken.

But another point was raised, for the first time, I believe, in this House. It was said that the vessel was insured with the Sunderland Company under a policy similar in its terms to this, and that inasmuch as upon the true construction of this policy and the Sunderland policy no more could have been recovered by the assured than four-fifths of £3750, therefore the condition was not broken, because the assured had kept the vessel uninsured to the extent of one-fifth. I do not think that that point is open to the appellant. No proof was led; and having regard to the manner in which the questions have been raised, and to the correspondence which passed between the parties, I am of opinion it is not open to the appellant now to take such a point. But I may add that, even if it were, it does not seem to me necessary to dwell upon it, for the appellant really could not make good any such claim. By agreement before this loss took place, the valuation in the Sunderland policy was raised to £5000. Supposing, therefore, that the appellant were to have recovered £1000 upon this policy, and to have sued the Sunderland company for £3000, I am quite unable to see what answer the Sunderland company would have had upon their policy to that claim for £3000; and, inasmuch as the appellant could lawfully have recovered £4000, I am equally at a loss to see how it could be said that he had kept, as between himself and the respondent company, one-fifth uninsured.

For these reasons I move your Lordships that the interlocutors appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

I also am of opinion that according to the right construction of this contract the articles of association referred to in the policy must be taken to be those articles which had been duly registered, and under which the company was trading at the date of the contract. I am not prepared to hold that in a question with a person in the position of this appellant these articles were in any sense invalid; because there was no defect of power on the part of the company to make those regulations which are contained in article 67 for the guidance of the directors in conducting the business of the company. On account of an irregularity in the passing of the resolution, the article might be open to exception at the instance of members of the company in a question with their directors; but in a question between the company and those who bonâ fide traded with it through its directors, these articles were valid in this sense that the directors could bind the company, and the company could take no exception to a contract made by them on the ground that there had been an irregularity in the manner in which the resolutions were passed.

Now, it is idle to suggest that when the directors are contracting, any distinction is to be drawn between the validity of a stipulation which is not to the advantage of the company and the validity of a stipulation which is obviously for its advantage. All that can be suggested is that the members of the company are much less likely to challenge it in the one case than in the other; but the question as between validity and invalidity arising from an irregularity is, to my mind, purely a domestic matter; it is a matter which concerns the company and its directors, and not one which concerns the company dealing with bonâ fide third parties outside.

In this case the declaration of the policy is that a certain provision in these articles of association shall so far as regards this insurance be as binding upon the assured as upon the person or persons effecting the insurance. The persons who effected it had power to pass it; it was binding upon them to its full extent even when effect was given to those stipulations which were irregularly entered in the articles of association. There was no defect of power on the part of the appellant; and why two parties, the one having authority from the company and the other transacting for his own hand and on his own behoof, should not be able to make a contract effectually binding in terms upon both of them I am unable to understand.

With regard to the last point, which it was sought to raise here for the first time, I am of opinion that it would be pessimi exempli to allow an appellant who has conducted his case in both Courts below upon the footing that the legal effect of a particular document was admitted, to traverse in this House the construction which has been put upon the document all along, even though he does not produce it at the bar; for the Sunderland policy, upon which so much has been said, is not in process.

LORD ASHBOURNE :—

I concur. I think the appellant has no case.

LORD SHAND :—

I am of the same opinion. The circumstances in which the question has arisen are these. In the first place, the alteration on the articles of association which is said to be ineffectual and which, if challenged timeously by a member of this company, Lord Shand.

might have been held to be ineffectual because of the failure to observe the requirement of the Companies Act with regard to notice, was registered upwards of five years before this policy was entered into. In addition to that, on the back of the policy the detail of the altered article is given, and the attention of the insurer is drawn to it by a printed note on the front of the policy, "See the other side." It is clear that the company for a period of five years have carried on their business in conformity with the provisions of the altered article by making their policies conform to it. Under these circumstances, I am of opinion with your Lordships that in construing the policy, the meaning of the words "according to the articles of association of the company" is, the articles of association as those articles have been registered and acted upon by the company, and I think that this consideration is very much strengthened by what has been observed by my noble and learned friend opposite (Lord Watson) that the provision in the policy goes on to say, "and shall, so far as regards this insurance, be as binding upon the assured as upon the said person or persons effecting this insurance."

LORD BOWEN :—

I have nothing to add to what has already fallen from those of your Lordships who have spoken.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 17th Nov. 1893.

Agents for appellant: *Traill & Howell, for R. & R. Denholm, S.S.C., Edinburgh.*

Agent for respondents: *A. Beveridge, for Beveridge, Sutherland & Smith, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1894
March 6.

THE LORD ADVOCATE . . . . APPELLANT;

AND

BOGIE AND OTHERS (METHVEN'S EXECUTORS) RESPONDENTS.

Revenue—Inventory, or Probate, Duty; and Legacy Duties—Legatees identified by reference to Will of another Testator—Whether Duties under both Wills must be paid—48 *Geo.* 3 (1808), *c.* 149, *s.* 38—*The Stamp Act*, 1815 (55 *Geo.* 3), *c.* 184, *s.* 37—*Stamp Duties Act*, 1845 (8 *&* 9 *Vict. c.* 76), *s.* 4—*Stamp Duties, &c., Act*, 1860 (23 *Vict. c.* 15), *s.* 4—44 *Vict. c.* 12, *s.* 32.

By the Stamp Act, 1815 (55 Geo. 3, c. 184), s. 37, the estate liable to inventory duty or probate duty is defined as "the personal estate and effects of any person deceased."

By sect. 4 of the Stamp Duties Act, 1845 (8 & 9 Vict. c. 76), it is provided that the following shall be deemed a legacy liable to duty: "Every gift by any will," &c., "of any person which by virtue of any such will, &c., shall have effect or be satisfied out of the personal or moveable estate or effects of such person, or out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of."

By sect. 4 of the Stamp Duties Act, 1860 (23 & 24 Vict. c. 15), it is enacted that the stamp duties payable by law upon inventories are to be levied and paid in respect of "all the personal or moveable estate and effects which any person hereafter dying shall have disposed of by will, under any authority enabling such person to dispose of the same as he or she shall think fit."

A. bequeathed one-third of the residue of her estate to B., and, failing him, to his executors and representatives. B. pre-deceased A., leaving a will under which he appointed executors.

The Crown having claimed, in addition to the inventory duty (called in England probate duty) and legacy duty paid by the executors of A.'s will, a second inventory duty and legacy duty from B.'s executors on one-third of A.'s residue, on the ground that it had been disposed of by B.'s will:—

Held, affirming the decision of the Court of Session (20 Court Sess. Cas. 4th Series (Rettie), 429), that the Crown was not entitled to the duties claimed, the property not being the personal estate and effects of B. within the meaning of the statutes.

APPEAL from a decision of the Court of Session, as the Court of Exchequer in Scotland (1).

This action was raised by the Lord Advocate, the appellant, as representing the Crown, against William Bogie and others, executors of Robert Methven's will, the respondents, claiming inventory duty—as it is called in Scotland, which is equivalent to probate duty in England—and legacy duty upon a third share (about £5000) of residue of the estate of a lady called Miss Scott. The duties were claimed as payable under the different statutes (1) imposing liability, and particularly under the Acts 23 Vict. c. 15, s. 4, and 8 & 9 Vict. c. 76, s. 4, and were in addition to the inventory duty, or probate duty, and legacy duty already paid by Miss Scott's executors. The material words of Miss Scott's will were: "With regard to the free residue of my whole moveable means and estate of every description," after payment of debts and legacies, "I leave and bequeath the same to Robert Methven, Robert Russell, and James Russell equally between and amongst them, share and share alike, for their own use and behoof, and failing all or any of them by their predeceasing me, to their several and respective executors and representatives whomsoever, whom I do hereby appoint to be my residuary legatees."

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(1) 20 Court Sess. Cas. 4th Series (Rettie), 429.

Robert Methven predeceased Miss Scott. He died on the

(1) *Inventory duty* or *probate duty*. 55 Geo. 3, c. 184, s. 37, defines the estate liable to this duty as the "personal estate and effects of any person deceased." And the 23 Vict. c. 15, s. 4. The stamp duties payable by law upon . . . probates in England and Ireland and inventories in Scotland shall be levied and paid in respect of "All the personal or moveable estate and effects which any person hereafter dying shall have disposed of by will, under any authority enabling such person to dispose of the same as he or she shall think fit."

Legacy duty. 8 & 9 Vict. c. 76, s. 4: "From and after the passing of this Act every gift by any will or testamentary instrument of any person which by virtue of any such will or testamentary instrument is or shall be payable, or shall have effect or be satisfied out of the personal or moveable estate or effects of such person or out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of . . . . shall be deemed a legacy within the true intent and meaning of all the several Acts granting or relating to duties on legacies in Great Britain and Ireland respectively, and shall be subject to the said duties accordingly."

Subsequent inventories. 44 Vict. c. 12, s. 32: "If at any time it shall be discovered that the personal estate and effects of the deceased were at the time of the grant of probate or letters of administration, of greater value than the value mentioned in the certificate . . . . a further affidavit with an account" shall be delivered within six months after the discovery, with 5 per cent. interest.

3rd of April, 1887. Miss Scott died on the 20th of July, 1888. Her will was dated the 2nd of September, 1882. Robert Methven left a will dated the 21st of January, 1885, with codicil dated the 4th of October, 1886, appointing the respondents his executors, and they are now administering his estate, of which the residue was to be divided among certain charities after the death of his brother, which took place on the 24th of July, 1890.

After Miss Scott's death, in an action between Robert Methven's next of kin and the respondents as his trustees and executors as to the disposal of this third of her residue, the Court of Session held, on the 30th of January, 1890 (1) that the effect of Miss Scott's will was not to vest in the executors of Robert Methven a beneficial interest in the property left, but that they took as executors; and that they were bound to deal with it in precisely the same manner as they had to deal with the estate which had passed to them under Robert Methven's will.

The Lord Ordinary (Wellwood), on the 8th of December, 1892, held the Crown was not entitled to the duties claimed. And this decision was adhered to by the judges of the Inner House on the 28th of February, 1893.

On appeal,

1894. March 2, 5, 6. *The Lord Advocate* (*Balfour*, Q.C.) and Sir *John Rigby*, S.G. (with them, *J. Patten-MacDougall*, of the Scotch Bar), for the appellant:—

Upon the true construction of the statutes relative to inventory duty, probate duty, and legacy duty, the property in question was part of the estate of Methven, and it has been administered as such. The estate liable to inventory duty is defined by 55 Geo. 3, c. 184, s. 37, as the personal estate and effects of any deceased person, and by the 23 & 24 Vict. c. 15, s. 4, all moveable estate disposable under a power is included. Here, if it had not been for Methven's will, his executors would not have obtained this property, and they must get it through that will. If Methven had died insolvent, this property would have been applicable to the payment of his debts. Jarman on Wills, 4th ed., p. 118, states the general rule that whatever is bequeathed to the executor or administrators of a person vests in them as part of the personal estate of the testator. In *Long* v. *Watkinson* (1), Lord Romilly, M.R., said, with respect to a fund got in under a similar disposition as here, that it was to be massed and mixed with the other estate, and that out of that mass would be paid debts and legacies, residuary legatees or next of kin according to the circumstances. Indeed, in all the cases, a gift to a dead man's legal personal representatives is spoken of as part of the personal estate of the dead man: *Leak* v. *Macdowall* (2); *Trethewy* v. *Helyar* (3); *Clay* v. *Clay* (4); *In re Valdez's Trusts* (5); and *Attorney General* v. *Brunning* (6). Under a provision in the English Wills Act (7 Will. 4 and 1 Vict. c. 26), s. 33, similar to the Scotch system conditio si sine liberis, a sort of fictitious survivorship is created, so that the legacy does not lapse, and in *Executors of Perry* v. *The Queen* (7), it was held that two probate duties were payable: see also Wigram, V.C., in *Winter* v. *Winter* (8).

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(1) 17 Court Sess. Cas. 4th Series (Rettie), 389.

[LORD WATSON:—In Scotland a child taking by conditio si sine liberis would not require to take out probate.]

The meaning of the words "personal estate or effects of the testator" cannot be restricted to what is personal estate at the testator's death. They must include everything which can legitimately fall under that description at any subsequent period. Suppose a covenant to insure—broken after the testator's death—and damages obtained, that would increase his estate, and probate would have to be paid upon it. Again, on production of Methven's will without confirmation, if no other property had been coming to Methven's executors, Scott's executors might have refused to pay over this money unless Methven's executors took out confirmation.

In *Attorney General* v. *Brunning* (6) it was said, that the land had not been converted into money because the sale had not been completed; but it was held that the money was subject to probate duty.

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(1) 17 Beav. 471.
(2) 33 Beav. 238.
(3) 4 Ch. D. 53.
(4) 54 L. J. (Ch.) 648.
(5) 40 Ch. D. 159.
(6) 8 H. L. C. 243.
(7) Law Rep. 4 Ex. 27.
(8) 5 Hare, at p. 313.

Secondly, the bequest, if not part of Methven's estate, passed to his executors; and the ultimate legatees will take in virtue of the exercise of a power given to Robert Methven. There is no difference between the questions of inventory duty and legacy duty; either both are dues or neither.

Sir *Henry James*, Q.C., and *Lorimer* (of the Scotch Bar) (with him, *Thomas Shaw* (1), of the Scotch Bar, and *James S. Henderson*), for the respondents:—

Probate and legacy duties have been paid on this fund once already, and it is now sought to make the fund in its transmission from one disposing hand to one beneficial recipient liable to two probate and two legacy duties. This appears never to have been attempted before, and the only case cited is *Executors of Perry* v. *The Queen* (2), a case under the English Wills Act. When taxation is sought to be imposed, it must be proved that the statutes apply; and it must not be a matter of conjecture or reasoning.

By the Act of 1860, superseding the Act of 1815, what is required is that probate duty shall be paid in respect of the personal or moveable property which any person hereafter dying shall have disposed of by will. It need not be property in possession, but it must be a vested interest. If Miss Scott had told Methven she intended to leave him this sum, such intention would not have been a bequest of money, for a will is not a will until the death of the testator. The appellant admits that at the time of Methven's death this property was no part of his estate. Now suppose that after Methven's death Miss Scott had said, "I now make my will, and instead of having an independent administrator of my estate, and inasmuch as I wish the recipient of the funds, whether creditors or legatees, shall be identical with those of Methven's estate, I leave it to the persons who are to be the executors of that will to administer as they have to administer Methven's estate." And although her will might be made before Methven's death, the determination might be the same, she knowing of Methven's death and allowing her will to continue unaltered. And it does not affect the question of duties that if Methven died insolvent his creditors might ask that Miss Scott's fund should be administered as part of his estate.

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(1) Now Solicitor General for Scotland.

(2) Law Rep. 4 Ex. 27.

It is a fallacy to say that because property has to be disposed of as the property of a dead man, that therefore it was his property. Suppose a person in Scotland approved of the George Heriot's Hospital Trust, and said, "Let me add to the benefit and treat it as George Heriot's money." Is it enough to say that because it was administered as George Heriot's it was his property either by any disposition by him or that he had it to administer? As to Miss Scott's executors paying without confirmation, had it been that there was no estate making it worth while for Methven's executors to take out probate, then in Scotland they could recover the sum without probate, and in England, if they were required to take out probate, it not being a question of title, but only of proof that they are the proper persons, they could obtain probate without paying duty, because duty had been paid.

Nor can this property come under the Act 44 Vict. c. 12, s. 12, for Methven's estate was admittedly correctly stated at the time of his death. The Act provides for a supplemental inventory being added, it may be of a ship supposed to be lost coming home, or a supposed copy of a picture turning out to be an original. But it is impossible to contend that at the time of the grant of probate, twelve months—and it might be sixty years—before Miss Scott's death, the estate of Methven was of greater value to the extent of the estate left by Miss Scott. Then take the case of this property being left to Miss Scott under a power of appointment by will, subject to a condition that she shall not leave it to a certain objectionable society, according to the appellant's argument she could look round, finding Methven had instructed his executor to hold in trust all his estate for such society, and, knowing that, she can say, "I leave my property to that executor." If the appellant is right, this property would not go to the society from Miss Scott at all. But could any Court say it was a good bequest, or that the society took under Methven's will? In the case of damages obtained for breach of covenant to insure, they would be obtained on the ground that the estate was injured, and the estate was plus or minus the injury at the time of the death. In *Attorney General* v. *Hubbuck* (1), Coleridge, C.J., citing the judgment of Lord Cranworth, said that whatever the character is that is impressed upon the property by the law at the time when the breath leaves the body of the owner, that is its character for the purpose of fiscal duties. The language of Jessel, M.R., in *Trethewy* v. *Helyar* (2), does not apply, although perfectly apt language considering the subject-matter before him, namely, whether the executor took a beneficial interest. On the other hand, Lord Romilly, M.R., has given effect to the respondents' proposition, where he says, in *Long* v. *Watkinson* (3): "It is the same as if the testator had said 'Let the residue of my estate be administered in the same manner and upon the same trusts as if it formed part of my sister's estate.'" Hanson on Probate Duty, 3rd ed., says (pp. 6, 68), "probate duty is not payable in respect of property which is bequeathed to the executors of a deceased person to be applied as part of his personal estate, but which never did in fact belong to him." As to legacy duty, the duty is upon the gift, and the same arguments apply.

The Lord Advocate, in reply:—

The respondents admit that if Methven had died intestate this property would have gone to his successors ab intestato. If he had been testate that it would go to his legatees; and if he had been insolvent, to his creditors. These are the usual tests of the vesting of property in a particular person.

LORD HERSCHELL, L.C.:—

My Lords, the question raised in the present case is whether inventory duty and legacy duty are to be paid in respect of a certain part of the estate of Miss Scott which passed to the executors of Mr. Robert Methven.

Robert Methven left a trust disposition and settlement and

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(1) 13 Q. B. D. at p. 280.

(2) 4 Ch. D. at p. 56.

(3) 17 Beav. at p. 474.

Lord Herschell, L.C.

died. By this trust disposition and settlement the defenders were his trustees and executors, and became entitled to his heritable and moveable estate. Miss Scott, who had made a trust disposition in the lifetime of Robert Methven, by that disposition provided with regard to the free residue of her whole moveable estate and effects in these terms: "I leave and bequeath the same to the said Robert Methven, Robert Russell, and James Russell equally between and amongst them share and share alike for their own use and behoof, and failing all or any of them by their predeceasing me to their several and respective executors and representatives whomsoever whom I do hereby appoint to be my residuary legatees." Of course there is no question that inventory duty must be paid upon the third of the residue which is now in question passing under Miss Scott's will; and there is no question that legacy duty must be paid in respect of the disposition to which I have just called your Lordships' attention. The question is whether a second duty is payable.

Miss Scott survived Robert Methven, and therefore the gift to him personally never took effect. At the time from which her will must be regarded as speaking Robert Methven was dead. His estate had passed under this trust disposition to his executors and was then ascertained. It has been held (1), and it is not now in dispute, that the effect of Miss Scott's trust disposition was not to vest in the executors of Robert Methven, the defenders, and the respondents here, a beneficial interest in the property left by Miss Scott, namely, one-third of her residue; that what they took they took as executors, and that they were bound to deal with this third of the residue in precisely the same way as they had to deal with the estate which had passed to them under Robert Methven's will.

Under these circumstances, it is contended on behalf of the Crown, who are the appellants at your Lordships' bar, that inventory duty is payable in respect of the moneys which thus came to the executors of Robert Methven as part of Robert Methven's estate, and that legacy duty is payable by the beneficiaries under Robert Methven's will, who of course will take, by virtue of this disposition of Miss Scott's, the money which so passes to the executors of Methven.

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(1) 17 Court Sess. Cas. 4th Series (Rettie), 389.

It may be that under circumstances such as I have detailed it would be neither unreasonable nor unjust that this second duty, as it is called, should become payable; but with that your Lordships have not to deal. It can only be payable if it falls within the taxing provisions which have been enacted by the legislature with reference to inventories and legacies.

The Stamp Duties Act of 1815 defines as the estate liable to inventory duty or probate duty "the personal estate and effects of any person deceased." Now the contention on behalf of the appellants is that the effect of Miss Scott's disposition coupled with Methven's was to make this third of the residue of Miss Scott's estate part of the personal estate and effects of Robert Methven. Of course it had never belonged to Robert Methven; at the time of his death it could in no sense be said to be his or any part of his estate. The contention is that the effect of Miss Scott's disposition is to add it to his personal estate, and to make it as much a part of his personal estate as if it had belonged to him in his lifetime. The only question which your Lordships have to consider is whether it has been in that sense so completely made a part of his personal estate as that within the words of the Stamp Duties Act, which I have read, it must be regarded as part of "the personal estate and effects of the deceased."

The will of Miss Scott, as I have said, must be taken as speaking from the time of her death; and the case appears to me to be precisely the same as if she in her lifetime had given the money to the executors of Methven to be used by them as executors in the same way as the other money which came to them as executors; I cannot think that there is any difference, because she made this disposition by will, and in her will had made Robert Methven himself a beneficiary in case he had survived her. One must look at the state of things at the time from which the will speaks.

Now, I think that the effect of her disposition was so to vest this money in the persons who were to administer Robert Methven's estate, that they would have to administer it precisely as if it were part of Robert Methven's estate. I will go so far as to assume that, so far as it was possible for her to do so, she made it a part of his personal estate. But admitting all that, it does not follow that the legal effect of what she did was to make it for the purposes of this statute that which it really was not, a part of "the personal estate of the deceased," which primâ facie means the personal estate which has been his. For many purposes it would no doubt be regarded in precisely the same way. The learned Lord Advocate said that the question was whether it was impossible for her to make it so. It seems to me, however, that the question rather is whether what she has done necessarily has the effect of making it a part of the personal estate of the deceased within the meaning of the statute. If it has, of course the duty follows; but I cannot think that this is the result. It appears to me that the effect cannot be said to be more than this; it is to be held by the same persons and administered in the same way and dealt with altogether as if it were part of the personal estate; but I do not think that makes it, or could make it, part of the personal estate within the meaning of this statute. And, my Lords, it seems to me difficult to resist that conclusion when it was admitted (or perhaps I should hardly say admitted) by the Lord Advocate, that if different words having precisely the same effect had been used by Miss Scott a duty would not have been payable; he admitted that if she had described in different words what is said to be the legal effect of her disposition as to the persons to administer, the mode of administration and the persons who were to benefit, it would have been difficult to contend that it would then have become a part of the personal estate. It seems to me that the only difference which can be suggested would have been that in the one case the duty would have been payable, and in the other it would not, although precisely the same legal result had been brought about by the use of different words.

I think this view of the case is strongly confirmed by the statutes to which attention has been called. So far as I am aware, the first statute which made an inventory obligatory is the 48 Geo. 3, c. 149, s. 38, which provides in respect of any person dying after the 10th of October, 1808, having personal or moveable estate or effects in Scotland, that before they are dealt with there shall be "a full and true inventory" on oath, containing a statement "of all the personal or moveable estate and effects of the deceased already recovered or known to be existing." Of course, that would have been satisfied in this case by an inventory made out shortly after Robert Methven's death and before Miss Scott's death, upon obtaining confirmation. The statute proceeds to deal with cases, which of course would frequently occur, in which, although a full statement was made of all the estate and effects of the deceased then known, it should be afterwards discovered that there was some property forming part of that estate which had not been known at the time when the inventory was made.

Then the statute proceeds in these terms, "If at any subsequent period a discovery shall be made of any other effects belonging to the deceased, an additional inventory of the same shall be in like manner exhibited"; and there are very considerable penalties imposed if that is not done. The statute therefore appears to contemplate that all that is required to supplement an honest statement of the property of the deceased in the first instance, is a further statement of any property subsequently discovered "*belonging to* the deceased." Now, my Lords, whatever may be the case with regard to the expression "personal estate and effects of the deceased," which can conceivably be regarded as an entity that may be added to, it seems to me impossible to contend that the words "belonging to the deceased" could have any application to a property which never belonged to him, and which was, as is suggested, added to his personal estate after his death. Those words occurring in the later part of the section appear to me to be very cogent in the interpretation of the earlier words of the section, which indicate the nature of the property that is to be included in the inventory, and strongly support the view that it would not include that which a person other than the deceased took steps to make and intended to make, so far as could be done, a part of the personal estate and effects of the deceased.

In the subsequent Act, the Act of 1881, which provides also for the payment of further probate duty, it is enacted in sect. 32

that "if at any time it shall be discovered that the personal estate and effects of the deceased were at the time of the grant of probate or letters of administration of greater value than the value mentioned in the certificate," then "the person acting in the administration of such estate and effects shall within six months after the discovery deliver a further affidavit." There, again, the test is made "the personal estate and effects of the deceased at the time of the grant of probate"; and that provision would clearly be inapplicable to the case where, after the grant of probate, owing to the dispositions of the will of another person, money or property was, in the way suggested, added to the personal estate, because of course it would not come within the words "were *at the time of the grant of probate* of greater value than the value mentioned in the certificate."

For these reasons I think that the taxing clauses do not apply to the portion of Miss Scott's estate which came to the executors of Mr. Methven; and all the illustrations which have been put, and all the questions which have been asked, really seem to me to depend upon the answer to that question. If, within the Act, it has become part of the personal estate and effects, then no doubt probate would be required to make title to it. If it has not so become part of the estate, then probate would not be required to make title. When once that question is answered all the other questions seem to be answered fully and without difficulty.

I will not detain your Lordships more than a moment upon the suggestion that if it is not within the words of the statutes I have quoted it is within the words of the Stamp Duties Act of 1860. It seems to me impossible to say that it was any part of "the personal or moveable estate and effects which" a person "shall have disposed of by will under any authority enabling such person to dispose of" as he thought fit.

The only question remaining is whether the beneficial interest can be regarded as subject to the payment of legacy duty by the beneficiaries. That depends upon the construction of the Stamp Duties Act of 1845, which defines as a legacy liable to duty "every gift by any will or testamentary instrument of any person which by virtue of any such will or testamentary instrument is or shall be payable or shall have effect or be satisfied out of the personal or moveable estate or effects of such person or out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of." It seems to me impossible to say that any moneys which may be received, by virtue of the dispositions which have been under consideration, by the persons who are named as beneficiaries in Mr. Methven's will, who in consequence of Miss Scott's disposition would take certain further benefits, are received as gifts by Mr. Methven's will which, by virtue of that will, are payable out of any personal estate of his or any "personal estate" which he had "power to dispose of."

For these reasons I move your Lordships that the judgment appealed from be affirmed and the appeal dismissed with costs.

Lord Watson:—

I also am of opinion that the judgment appealed from ought to be affirmed. I do not wish to suggest that Miss Scott could not have made such a testamentary disposition in favour of the beneficiaries under the will of Robert Methven as would have entitled the Crown to claim payment of duty. She unquestionably could have directed the trustees of Methven, whom she made her executors, to pay these duties to the Crown; and that direction would have been imperative. I do not think it is necessary to speculate how far she could have accomplished the object of making the Crown entitled to these duties by indicating that her bequest was to be in the same position under these statutes as if it had in point of fact belonged to the nephew who predeceased her. I am satisfied that no such thing was either done or attempted here. Miss Scott created, according to my view, a new trust in the persons of Methven's executors, the purpose of the trust being, not that the fund which she committed to them should become part and parcel of the deceased's estate, but that it was to be administered by the trustees as a separate estate, in the same manner and subject to the same conditions as if it had originally been the property of Methven himself.

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Lord Ashbourne:—

I entirely concur. The claim of the crown is practically for the recovery of a double duty; and for the reasons stated by the Lord Chancellor I think their case has entirely failed.

Lord Morris concurred.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Lords' Journals, 6th March, 1894.

Agent for appellant: *Sir W. H. Melvill, Solicitor for England of the Board of Inland Revenue, for Philip J. Hamilton Grierson, Solicitor for Scotland of the Board of Inland Revenue, Edinburgh.*

Agent for respondents: *D. E. Chandler, for William Black, S.S.C. Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1894
March 9.

EDINBURGH UNITED BREWERIES, LIMITED, and Others . . . . } Appellants;

and

MOLLESON and Another . . . . . . Respondents.

Sale of Business—Re-sale for enhanced Price—Misrepresentation—Restitutio in integrum.

On the 11th of November, 1889, the respondents arranged for the sale of a brewery in Edinburgh to D. The purchase was to take place as from the 15th of November, 1889, at the price of £20,500, the price to be paid by the 31st of December, at which date a conveyance was to be executed either to D. or to any company to which he might assign his interest. On the 14th of December, D. entered into an agreement to sell the brewery to the appellants; the price to be paid to D. by the appellants was £28,500. This contract purported to pass on all the rights of D. On the 31st of December a conveyance was executed by the respondents at the instance of D., in implement of the contract of the 11th of November, 1889, to the appellants, and D. ceased to have any interest in the brewery. In the contract of the 11th of November, 1889, were these conditions: "the arrangement proceeds upon the basis that the net profits of the brewery amounted during each of two years, ending the 31st of December, 1888, to £3750, or thereabouts, upon an average." "In the event of its being ascertained that this is not the fact, the arrangement is to be at an end." The conveyance of the 31st of December to the appellants did not set out these stipulations. Also by the contract of the 11th of November, 1889, D. was to be at liberty to have all the books connected with the business examined. All the books were examined by accountants selected by D., and a profit near the stipulated amount was reported. More than a year after the conveyance to the appellants, it was discovered that the books had been improperly dealt with by a clerk in the respondents' employment without the knowledge of the respondents. The alterations made the profits appear greater than they really were.

Under these circumstances, the appellants, with the concurrence of D., raised this action for reduction of the contract between the respondents and D., and the conveyance by the respondents to the appellants; the appellants offering to hand back the brewery. The ground of their contention was, first, that as between the respondents and D. the amount of the profits was made the basis of the agreement. And, secondly, that all the rights of D. were passed by him to the appellants. No action was taken to rescind the contract between D. and the appellants:—

Held, affirming the decision (but not agreeing in all the views) of the Court of Session, Scotland (20 Court Sess. Cas. 4th Series (Rettie), 581), that the appellants and D. had no title to maintain the action, D. having no interest in the subject-matter, the brewery; and, the disposition not embodying nor being intended to embody the stipulations of the original contract, the appellants had no right as against the respondents.

APPEAL from the First Division of the Court of Session, Scotland (1).

The question was whether a contract of sale to the appellant W. H. Dunn, who passed on the subject-matter of the sale at an increased price to the other appellants, the Edinburgh United Breweries Company, could be reduced by these appellants suing together.

The sellers were the respondents, J. A. Molleson, as trustee of David Nicolson, the proprietor, and Nicolson himself. The subject of the sale was the brewery in Edinburgh, known as the Palace Brewery, with plant and machinery, certain malting and bottling stores, and a wine business, all belonging to the respondent Nicolson. The action was laid on misrepresentation; but no personal fault was charged against the respondents, and certainly not against Molleson; but the case against them was that they were responsible for certain misrepresentation in the books made by a clerk named Geddes, in their employment at the brewery, as to the profits of the business. And that Dunn was induced to become the purchaser in reliance on those profits, and that those profits formed the basis of the contract with Dunn, and also, it was alleged, with the Edinburgh United Breweries Company. It appeared that Geddes altered the figures in the books and made it appear that the brewery was a paying concern, so that he might retain his situation.

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(1) 20 Court Sess. Cas. 4th Series (Rettie), 581.

After certain negotiations between Dunn and Molleson, a minute of agreement was executed. It was dated the 4th and 11th of November, 1889, and proceeded upon the narrative that Molleson and Nicolson, the second party, had agreed to sell, and Dunn, the first party, had agreed to buy, the Palace Brewery, along with the stocks therein, and also the stocks of the wine business. "And whereas it has been agreed that these presents should be entered into in order to set out the terms of the arrangement—

"(1.) The first party agrees upon the 15th of November, 1889, to purchase from the second party, and the second party agrees on the said date to sell to the first party, the brewery business, malting and bottling stores, belonging to the said Nicolson, with the whole fixed plant, &c., other than the casks and stocks afterwards referred to, at the price of £20,500."

(2.) Referred to the price of the casks and stocks which were to be valued by an arbiter, who did value them at £10,566.

(4.) Referred to the payment of the price.

(5.) If the balance of the price was not paid by the 31st of December, 1889, the sellers were to retain the deposit of £3700.

(6.) If the price was "wholly paid on or before the 31st of December, 1889, the second party shall upon completion of payment execute and deliver to the first party or his nominee" all deeds required for vesting him or them in the property.

(10.) "The arrangement herein set out proceeds upon the basis that the net profits from said brewery and wine businesses amounted, during each of the two years ending the 31st of December, 1887, and the 31st of December, 1888, to £3750 or thereabout upon an average, and in the event of its being ascertained that this is not the fact, this arrangement shall be at an end, and the second party shall be bound to repay the said sum of £3700. The first party, with the view of verifying the

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amount of the profits for said two years, shall immediately upon delivery hereof be entitled to have the books, accounts, and vouchers connected with the said businesses examined by an accountant named by him."

In terms of article 10, the books and balance-sheets of the business were submitted to accountants selected by Dunn. Their report was to the effect that the stipulated amount of profits, with the exception of a small sum, appeared to have been made. But the inspection was not an audit. Dunn arranged the small difference in the profits with Molleson, and it was taken that the statement of profits in article 10 was correct.

On the 14th of December, 1889, Dunn, who appears to have been acting on behalf of the City of London Contract Corporation, having assisted in the promotion of the company, entered into a sale of the brewery in question and three other breweries which he had acquired in Edinburgh to the appellants, the Edinburgh United Breweries Company. The price to be paid to Dunn for this brewery being £28,500.

This agreement sets out the different agreements which Dunn had concluded for the purchase of the several breweries, including that between Dunn and Molleson:—

"Whereas a company has been duly formed and registered under the Companies Acts, 1862 to 1888, with a nominal capital of £250,000. . . .

"And having for its objects amongst other things the purchase and acquisition of the premises and properties hereinbefore mentioned or referred to, and the transfer to the company of all the rights, interests, and benefits of the said Dunn in and under the hereinbefore recited agreements."

(1.) The said Dunn "agrees to sell, and the company agrees to purchase, subject to the conditions therein contained or referred to, all and singular the premises comprised in the hereinbefore-recited agreements, and all the right, title, and interest of the said Dunn therein."

"(4.) Upon the consideration for the purchase being paid, proper and valid assurances of the several properties purchased shall be executed by all necessary parties in favour of the company, and the company shall, subject nevertheless to the conditions in the said several hereinbefore-recited agreements, be entitled to possession of the said several premises and to the profits."

"(*b.*) As to the secondly hereinbefore recited agreement (i.e., that referring to the brewery, &c., belonging to Nicolson) as from the 15th of November, 1889."

"(5.) The purchase shall in all respects be completed in accordance with the conditions and terms of sale referred to in the said several recited agreements, as if the company had been named in the said agreements as the purchasers."

(7.) . . . "The company shall also be entitled to the benefit of all the conditions for the benefit or protection of the said Dunn in the said recited agreements contained, and shall have power to enforce the same in the name of the said Dunn upon the proper indemnity."

By a disposition or conveyance dated the 31st of December, 1889, and the 1st of January, 1890, Molleson and Nicolson, by the consent of Dunn, conveyed the Palace Brewery, &c., direct to the Edinburgh United Breweries Company, the consideration being £20,500 paid to Molleson, and £8000 paid to Dunn. The disposition proceeded: "Further, considering that it was as stated by the said Dunn in contemplation at the date of entering into the said minute of agreement that a company should be formed to take over the said brewery and others, &c.; and whereas a company has been formed with a view of taking over the said brewery and other businesses, &c., under the name of the Edinburgh United Breweries Company; and, whereas, by memorandum of agreement entered into between me, the said Dunn, and the said Edinburgh United Breweries Company (but with the provisions of which we the other granters hereof are in no way concerned and have no knowledge thereof), I, the said Dunn, agreed to sell and the said company agreed to purchase." . . . . "And now, seeing that the said Dunn in respect of his said purchase and interest in the premises, and the said Edinburgh United Breweries Company, have called upon me, the said Molleson as trustee aforesaid, and with consent aforesaid, to grant a disposition and assignation in favour of the said company, to which I the said Dunn, in order that it may be vested in the whole subjects and others, agreed to be sold by me the said Molleson as trustee aforesaid, and hereinafter disponed, which we are willing to do."

The Edinburgh United Breweries Company had worked the Palace Brewery for eighteen months when they discovered in 1891 that the books which had been given to Dunn's accountants to be examined had been previously fraudulently altered so as to shew a longer profit than actually made. Thereupon they and Dunn, on the 20th of August, 1891, raised this action against Molleson and Nicolson for reduction (1.) of the minute of agreement between Molleson and Dunn, and (2.) of the disposition by Molleson to the Edinburgh United Breweries Company, and for the repayment of the sums of £20,500 and £10,566. "The pursuers always giving up to the defenders the possession of the said brewery, malting, and casks purchased as aforesaid belonging to the said brewery, and also giving up the said wine business, and accounting to the defenders for the profits of the said business after deduction of all expenses from the 31st of December, 1889."

Alternatively damages were asked.

They averred—Cond. 3: It was in the view of all parties, as is shewn by the terms of the said agreement, that the purchase of the Palace Brewery should be assigned and handed over by Dunn to others. The first-mentioned pursuers' company was formed to acquire this and other purchases of Dunn's, and did so acquire it by agreement, following upon which and on the said agreement, the disposition which is the deed second under reduction in the summons was granted by the defenders, with consent of the pursuer the said Dunn, in favour of the pursuers the said Edinburgh United Breweries, Limited.

Cond. 7: By the agreement between Dunn and the Edinburgh United Breweries Company, it was provided that the said Edinburgh United Breweries, Limited, should have all the rights competent to Dunn against the granters of the said agreement, as if the said United Breweries Company had been the original purchasers . . . . The transaction was carried out by the disposition before mentioned, and by the defenders handing over the casks and stock in trade directly to the pursuers the Breweries Company, who entered into possession as from said 15th of

November, 1889, and receiving the said price directly from them.

Cond. 8: The pursuers' company was formed with a view to the purchase of four brewery businesses in Edinburgh, including the one in question. The agreements between Dunn and the proprietors of said business were entered into in view of such incorporation and for the purpose of immediate transfer to the company, when formed, of all his interests under said agreements . . . . "The information obtained from the sellers by Dunn with reference to the assets and past profits of the said business was communicated to the pursuers, the Edinburgh United Breweries Company."

Cond. 9: In terms of sect. 10 of the said minute of agreement certain books and balance-sheets of the business were submitted to chartered accountants on behalf of Dunn in order to ascertain the profits. It then describes the fraud, and continued:—

"Molleson was aware of the extreme importance of the said balance-sheets, and had the means, if he chose to use them, of ascertaining that they had been falsified as above mentioned. He either knew or ought to have known that the same were false, and were fraudulently concocted in order to shew said excessive profits. Whilst in that position he handed the said false balance-sheets to the pursuers for the purpose of getting them to enter into the contract in question on the basis of the profits thereby shewn. Mr. Molleson thereby induced the pursuers by false and fraudulent representations to enter into the said contract. Under the contract into which the pursuers were thus induced to enter, the defenders benefited to the extent of the enhanced price thereby received."

Cond. 13: Had the true state of matters been set before the parties by Molleson and his employees, the transaction would not have been entered into. In no view would the same have been proceeded with except at a reduction of at least £10,000 upon the purchase price, that being the sum proportionate to the said difference between the true and the falsely represented profit.

They also alleged that restitution in integrum was capable of being accomplished.

The respondents denied the allegations of fraud, or that it was in view of the whole parties that the purchase of the brewery should be handed over to others; that they had no knowledge of the agreement between Dunn and the Edinburgh United Breweries Company; that Dunn had suffered no damage, and that with the Edinburgh United Breweries Company the respondents had no contract.

The Lord Ordinary (Kyllachy) having allowed a proof, which ruling was affirmed by the First Division, his Lordship on the 13th of July, 1892, assoilzied the respondents from the conclusions of the action.

1893. March 17. Lord M'Laren delivered the judgment (1) of the First Division, adhering to the interlocutor of the Lord Ordinary.

On appeal,

March 6, 8, 9. Sir *John Rigby*, S.G., and *Asher*, Q.C. (with them *Thomas Shaw*, the two latter of the Scotch Bar), for the appellants:—

Under the contract between Molleson and Dunn a certain amount of profits was made the basis of the contract, and the contract provided that if it should be ascertained at any time that those profits had not been made the contract was to be at an end. Then all the rights including this right of Dunn's were passed on by him to the Edinburgh United Breweries Company, and the latter were entitled themselves as a matter of contract to sue for reduction of the sale. It is shewn that both Dunn and the company were misled by dishonest books of account. Dunn was induced to accept the conveyance by the implied representation that the books were honest, and they not being so, he can as against Molleson obtain reduction. The innocence of Molleson with regard to the fraud is of no consequence in a question of rescission; and upon the discovery of the fraud Molleson cannot keep his bargain: *Redgrave* v. *Hurd* (2). Secondly, the sale from Dunn to the Brewery Company is involved in these proceedings, and the appellants do not insist on that sale. Dunn passed on the representation

(1) 20 Court Sess. Cas. 4th Series (Rettie), 581.

(2) 20 Ch. D. 1.

for which Molleson must be held responsible, that the profits were as stipulated for; and, the Brewery Company having accepted such statements as true on the part of Dunn, it followed that the contract between them and Dunn was impeachable, and that is sufficient for this case.

[LORD HERSCHELL, L.C.:—That is a different case to that raised in the condescendence or in the Court of Session. Lord McLaren says it was admitted that the contract between Dunn and the Brewery Company was not unimpeachable, and all the facts which might be produced in such a case are not here.]

[LORD MACNAGHTEN:—And Dunn could not return to his original position by giving up an unimpeachable contract.]

The appellants contend that the contract is impeachable. Besides, the appellants are entitled here to argue a case not made in the Court of Session. See *Cooper* v. *Cooper* (1). It may only be a question of paying costs. The Brewery Company has exactly the same case against Dunn which Dunn has against Molleson, and the two former can sue together, and together return the brewery back again to Molleson. If a sale is induced by fraud to A., and A. sells to B. in the circumstances here, surely A. and B. coming together can rescind the contract. [They also cited *Coaks* v. *Boswell* (2).]

The Lord Advocate (*Balfour*, Q.C.), and *Ure* (of the Scotch Bar), for the respondents, were not called upon.

LORD HERSCHELL, L.C.:—

This is an appeal from an interlocutor of the First Division of the Inner House affirming an interlocutor of the Lord Ordinary. The action is of a somewhat peculiar character. The pursuers are the Edinburgh United Breweries Company and Mr. Dunn; the defender is Mr. Molleson. Mr. Molleson, who was the trustee of a brewery belonging to Mr. Nicolson, on the 11th of November, 1889, entered into a contract with Mr. Dunn for the sale to him of the Palace Brewery and the business and stocks connected with it. The purchase was to take place as from the 15th of

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(1) 13 App. Cas. 88.

(2) 11 App. Cas. 232.

November, 1889, at the price of £20,500. The purchase-money was to be paid by the 31st of December, at which date a conveyance was to be executed either to Mr. Dunn or to any company to which he might assign his interest, it being no doubt in contemplation at that time that a company would be formed for the purpose of carrying on this and other businesses. That was a matter in which Mr. Molleson had no concern or interest, except that he agreed to make the conveyance either to Mr. Dunn or to such nominee of his. The 10th clause of the agreement is the one upon which the appellants place their reliance.

Before reading the terms of that clause, however, I will state to your Lordships what subsequently took place. Mr. Dunn, on the 14th of December, entered into an agreement with the United Breweries Company, the pursuers, by which he agreed to sell them this brewery and several other breweries. To some of the terms of that agreement I shall have presently to call your Lordships' attention, but the price to be paid by the United Breweries Company to Mr. Dunn, who it appears was really acting for the Contract Corporation, was the sum of £28,500, being £8000 more than the price which was to be paid by Mr. Dunn to Mr. Molleson. On the 31st of December a conveyance was executed by Mr. Molleson, at the instance of Mr. Dunn, by which Molleson, in implement of his contract of the 11th of November, conveyed to the United Breweries Company the Palace Brewery and all the other subjects of the contract of the 11th of November; so that a profit was made upon the transaction by Mr. Dunn, or the Contract Corporation (it matters not which), of £8000. Mr. Dunn at that date ceased to have any interest in the Palace Brewery or in the contract entered into with Mr. Molleson.

The tenth clause of the original agreement provided that "the arrangement herein set out proceeds upon the basis that the net profits from said brewery and wine businesses amounted during each of the two years ending 31st of December, 1887, and 31st December, 1888, to £3750 or thereabouts upon an average." It further provided that, "in the event of its being ascertained that this is not the fact, this arrangement shall be at an end, and the second party" (that is Mr. Molleson) "shall be bound to repay the said sum of £3700," which was the deposit to be paid upon the execution of the agreement. "The first party" (that is Mr. Dunn), "with the view of verifying the amount of the profits for said two years, shall immediately upon delivery thereof be entitled to have the books, accounts and vouchers connected with said businesses examined by an accountant named by him." In accordance with the provisions of that clause all the books of Mr. Molleson connected with the brewery were placed before accountants selected by Mr. Dunn, and were examined by them as fully as it appeared to them to be necessary to examine them. They reported that the books shewed a profit of somewhat less than the sum named, that is to say, a profit of £3300 instead of £3750; but there was a discussion as to whether they had arrived at the profits upon the true basis. I do not think that, for the present purpose, the difference between £3300 and £3750 is material; I will take it for the purposes of my judgment that the books shewed, according to the report of the accountants, the profit stated, namely, £3750. It was discovered, something more than a year after the conveyance to the Brewery Company, that the books had, in fact, been improperly dealt with by a clerk in the employ of Mr. Molleson—that he had altered some of the items in the books with the view of making the profits appear greater than they really were. I assume, for the purpose of the opinion which I am about to express, that, although all the books, vouchers and accounts were in the hands of the accountants, and they could, if they had examined them, from the materials in their possession, have found out the frauds which had been committed, yet the kind of examination contemplated by the parties to the contract was such that the frauds would not in ordinary course have been discovered.

Under these circumstances the United Breweries Company and Dunn come as pursuers, claiming a reduction of the disposition entered into between Molleson and the Breweries Company and Molleson and Dunn, and insist that they are entitled to have those agreements and dispositions reduced. Their case is put by the learned counsel for the appellants in two ways. First, it is said that under the contract between Dunn and

Molleson profits were made the basis of that contract; that the contract itself provided that if it were ascertained at any time that those profits had not been made the contract should be at an end—that all the rights of Dunn under the contract were passed by him to the United Breweries Company, and that therefore the United Breweries Company are entitled as a matter of contract to say that the transaction not having been carried out in accordance with that which is declared to be its basis, and the United Breweries Company and Dunn having been misled into believing that the books were what in fact they were not, the United Breweries Company can themselves maintain this action of reduction in right of the transfer to them by Dunn of his rights.

My Lords, that depends of course upon the construction of the 10th clause of the contract. I will assume that whilst the matter was in fieri, until the 31st of December, when the conveyance was executed, the United Breweries Company, under their contract with Dunn, could have taken advantage of this stipulation in Dunn's contract with Molleson and have insisted that the arrangement was at an end. But the question is, what is their position in that respect after the disposition of the 31st of December, by which the brewery was conveyed to and vested in the Breweries Company, the total purchase-money being paid by Dunn to Molleson. Now, my Lords, it appears to me that the very terms of the tenth article of the contract shew that it is only providing as a matter of contract between the parties for what is to take place between the making of this contract and the disposition in implement of it. It is true that there is no limitation in terms of the time during which this 10th clause is to operate, but it appears to me that that time is necessarily ascertained by the terms of the clause: "In the event of its being ascertained that this is not the fact" (that is, that such profits are not made), "this arrangement shall be at an end, and the second party shall be bound to repay the said sum of £3700." That is the sum which would be payable prior to the execution of the conveyance; it was "this arrangement," this contract, which was to be at an end, and it was this sum which was to be repaid.

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Now, it seems to me, that that shews as plainly as anything can, that the contract did not provide for the insertion in the disposition of any clause making that disposition void if the profits were ascertained to be less than was stated; but what both of the parties contemplated was, that the time given down to the 31st of December would be sufficient for ascertaining whether the alleged or suggested profits had been made, and within that time no doubt the arrangement would have come to an end in accordance with clause 10, if it had been ascertained that the alleged profit had not been made. But when this disposition was executed the contract ceased to be in fieri, and the rights of the parties fell to be ascertained the terms of the disposition. It is not at all infrequent for an agreement to contain stipulations which find no place in the subsequent disposition, but the rights of the parties must be ascertained by the disposition executed in implement of the contract and not by the contract which contemplates that implement. When once the disposition is executed, it seems to me that, as a general rule (of course I am not saying there may not be exceptions), the rights under the contract come to an end. In this case I think that the very terms of article 10 are inconsistent with the continuance of it, or, at all events, that it is inapplicable to the period after the disposition has been executed. It appears to me, therefore, that, assuming that all the rights, including this right, under clause 10, were passed by Dunn to the United Breweries Company by his agreement with them of the 14th of December, yet after the execution of the conveyance of the 31st of December it ceased to be possible for them to rest upon this 10th clause as making that transaction void, and of course that transaction is the one which they seek to set aside. No doubt, if there had been any fraud, if there had been misrepresentation, it would have been open to Dunn, notwithstanding the execution of the conveyance, to set aside the conveyance and to put an end to the transaction altogether. That is not for a moment disputed, and, in truth, the stress which has been laid upon this 10th clause and the allegation that it contains a contractual right which was passed on to the Breweries Company and which still exists, have resulted from the difficulty in which the appellants felt themselves by reason of the circumstance that it is not Dunn who is now seeking to set aside the contract, but that it is the United Breweries Company, in truth, who are now the owners of the subject of it.

Therefore, in my opinion, the first ground upon which the appellants rested their case fails in point of fact; on the true construction of this 10th clause there is nothing upon which they can now rest as a contractual right created by it.

But then it is said that Dunn was led to take this disposition instead of asserting any right which he might have under the 10th clause, by reason of misrepresentation on the part of Molleson—that the books which were examined by the accountants must be taken to have been represented by Molleson as proper and genuine books, and that inasmuch as they were not so, Dunn would be entitled as against Molleson to rescind or obtain reduction of the conveyance. My Lords, I will for the present purpose assume that to have been the case; but the question is, Can there now be reduction in this suit at the instance of the present pursuers under the circumstances which exist? Dunn, in point of fact, parted with the property, and the conveyance was made at his instance to other people in pursuance of a contract of sale by him to them at a profit. Would Dunn then be in a position, having parted with the property and having parted with it at a profit, to come into Court and say: "I am entitled to claim that this contract shall be reduced." It is said that he has that right, because although he has parted with the property, the persons who are the present owners of the property, and who took from him, are brought also into Court as co-pursuers, so that the two together, at all events, could restore the subject-matter to Molleson. Does that give them a title to sue?

Now, even if it be admitted that if where a person who has purchased through a misrepresentation has resold, those representations have been repeated by him to the persons to whom he has resold, in such a manner as that they could impeach the transaction as against him, in that case, even without an actual reduction of the resale, the transaction might be reduced as against the original seller—even admitting that, it appears

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to me that no such case is really made here, either upon the pleadings, or, as far as I can see, upon the facts. The learned judge, Lord M'Laren, states more than once in his judgment that it was admitted that the contract of Dunn with the company was neither impeachable nor impeached; but whether that was admitted or not it seems clear, when one looks at the pleadings, that no such case was set up. It is quite true that in the 8th Condescendence it is stated that: "The information obtained from the sellers by Mr. Dunn, with reference to the assets and past profits of the said business, was communicated to the pursuers, the Edinburgh United Breweries, Limited." But the 9th Condescendence, up to which that leads, sets up this case, that Mr. Molleson "either knew, or ought to have known, that the" balance-sheets "were false and were fraudulently concocted, in order to shew said excessive profits. Whilst in that position he handed the said false balance-sheets to the pursuers" (that is, the United Breweries Company and Dunn) "for the purpose of getting them to enter into the contract in question" (the contract in question appears from the context to mean the one of the 11th of November, 1889) "on the basis of the profits thereby shewn. Mr. Molleson thereby induced the pursuers, by false and fraudulent representations, to enter into the said contract." Now, it is obvious that the case there set up is that, the transaction of the 11th of November, though nominally Dunn's, was really not only that of Dunn, but that of Dunn and the United Breweries Company. Of that there is not only no proof, but it is completely disproved; but that is the case set up upon the pleadings, and it is nowhere alleged that Dunn entered into the contract with the United Breweries Company under such circumstances, and with such representations, that as against him they are entitled to set aside the contract and claim reduction. For aught that appears upon these pleadings Dunn may be quite prepared, as between him and them, to stand by the contract, although he may be willing to assist them in restoring the brewery to Mr. Molleson, and getting back the £20,500. It is not alleged anywhere that his contract with them is impeachable; no circumstances are shewn raising any such case.

And, my Lords, when we come to the evidence which was read to us by the Solicitor-General yesterday, we know very little of what the transaction was as between Dunn and the company; but I certainly do not think it can be said to have been made out in any way that this contract could have been impeached as between Dunn and the company. It is said that the representations which were made by Molleson to Dunn were passed on by him to the company. Now, I think that that mode of stating the facts involves a fallacy. It may be that representations made to one are passed on, as it is said, by him to another; but they do not become, and are not necessarily, the same representations as were made to the person who originally received them.

It is said (and on that the whole case rests) that Molleson must be taken to have represented to Dunn that the books handed to him for inspection were genuine and properly kept books; but it is impossible to say that there is any evidence of any representation made by Dunn to the company which can be treated as a representation, that the books tendered by Molleson were in fact genuine. It is rational enough to hold that as against Molleson, that is the effect of his handing over the books; but when Dunn informs those to whom he is selling, as he obviously did by shewing them the contract, that the books to be examined by the accountants are the books handed over by Molleson, and when he hands to them the result of the accountants' inspection of those books, the utmost representation which he can be taken to have made is this, Here is the report of the accountants whom I have employed as to what is shewn by the books which Molleson handed over to those accountants as the books of the business. Beyond that, it seems to me to be impossible to say that any representation was made by Dunn to the United Breweries Company. Therefore, it appears to me that in the present case there is really no foundation laid for impeaching this contract as between Dunn and the United Breweries Company, even if (upon which I express no opinion) it would have been enough to shew that the contract was impeachable, and if it would not have been necessary, before such a proceeding as this was instituted, to have had it impeached and put an end to. I express no opinion upon that; but at all events I think that the foundation is altogether wanting unless the case can be brought up to that point.

I ought perhaps to add one other observation in connection with what I have just said, namely, that I must certainly not be taken as assenting to the view, or as expressing any opinion upon it, that if a person who has been induced by misrepresentation to buy a property has parted with that property, and if he can get back that property in any way so as to put himself in a position to restore it, he is then always in a position to claim reduction of the contract into which he was led by misrepresentation.

For these reasons, I move that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

Although I have come to the same conclusion as regards the result with the learned judges of the First Division, I am not in a position to give an unqualified assent to all that has been expressed in the judgment of Lord M'Laren, who delivered the opinion of the Court; and that for two reasons; in the first place, because I have not heard argument or made up my mind upon many points discussed in his judgment which it is unnecessary to advert to now; and also because upon those points on which we have heard argument, I am not prepared to concur with all that fell from Lord M'Laren.

It appears to me to be very necessary to keep in view the position of the three parties who appear upon the scene in this appeal, Mr. Molleson, Mr. Dunn, and the company. The contract sought to be set aside, which was implemented by a conveyance to the company, was a contract to which Mr. Molleson and Mr. Dunn were the only parties. There was no privity between Molleson and the company, and in conveying to them, Molleson simply fulfilled the obligation which he had undertaken to Dunn to make a conveyance to his nominee. The deed of conveyance is the only contract between Mr. Molleson and the company. By the ordinary rule of law, the moment a conveyance is accepted as in implement of the obligations of a contract, the original contract is at an end, and the conveyance constitutes the only contract between the parties.

In this appeal two grounds are urged for the rescission of the original contract by Mr. Dunn and also by the company, because they sue together, and if either has shewn a good title for rescinding the contract upon restitution the appellants must prevail. Now what is the position of Mr. Dunn? He made a remunerative sale, and he has no interest in the brewery, which was the subject of these dealings; and if he made a valid contract of sale to the company to be followed by a conveyance in virtue of his contract with Mr. Molleson, it humbly appears to me that his title to challenge this transaction with the respondent came to an end the moment the conveyance was completed.

I do not concur with some observations of Lord M'Laren to the effect that although the contract between him and the company might not be reducible, Dunn might by some arrangement with the company be enabled to bring an action for rescission upon tendering restitution. It may be that if the contract had been thrown back upon his hands by the company, and was reducible at their instance in a question with him, he would have been remanded to his original position and have been entitled to any remedy which he could have pursued before he parted with the brewery; but unless the sale by him to the company was reducible upon legal grounds, it appears to me that Mr. Dunn could not have rehabilitated himself so as to revive in his favour a remedy against the seller to him. I am assuming for the purposes of this case that Mr. Molleson did make representations which would have entitled Mr. Dunn, so long as he retained the brewery, to the remedy of rescission. Upon that point I, of course, desire to express no opinion, because, although the Court below has dealt with and expressed an opinion upon the point, I certainly do not feel inclined to concur upon a matter which obviously presents questions of delicacy and difficulty without having heard a full argument.

Therefore, it appears to me that Mr. Dunn as a pursuer is out of the case; he had no title in his own right, and I do not see how his concurrence can in the least degree aid the title of the company.

That title is rested upon two different grounds; one of them is the supposed transmission to them of a conventional stipulation which gives them a right to rescind the contract; the other is a ground dehors the contract, which rests apparently upon the transmission by Dunn to the company, in his dealings with the company itself, of the representations made to him by Mr. Molleson. As to the first, the conventional ground, I can only say that there does not appear to me to exist any right of rescission which could be conveyed to the company by Dunn. The agreement conveys from Mr. Dunn to the company all his rights under the contract, and one of these rights is said to be contained in article 10 of the contract. The terms of that article have been fully explained by my noble and learned friend, the Lord Chancellor, and in my opinion they do not amount to a condition, resolutive of the contract when concluded, by payment of the price and disposition of the property. They apply merely to the interval of time which the parties apprehended would elapse between the making of the antecedent contract and the conveyance which was to follow in execution of it, and they expired by efflux of time.

The next ground pleaded assumes that this contract of sale by Dunn to the company was reducible at the instance of the latter, because the representations made by Mr. Molleson to Mr. Dunn were transmitted, and handed on by Mr. Dunn to the company. In the first place, my Lords, there is no record for that. It is perfectly obvious that before the First Division at least, whether the counsel meant it or not, they must have expressed themselves in terms which led the Court to understand that Mr. Dunn was holding by his £8000 under his contract with the company. Whether that impression was right or not it is not for me to say; the question is not brought before us. But I think it right to add that although the record was supplemented in argument by a verbal condescendence by the Solicitor-General, nothing that he said was calculated to suggest that any relevant case could be made by the appellants for setting aside the agreement with Mr. Dunn.

Lord Ashbourne :—

I entirely concur and think the contentions of the appellants wholly untenable.

Mr. Dunn has made a profit of £8000 out of the transaction, and I do not see how the United Breweries Company can practically ignore that circumstance, and occupy a stronger position than the man through whom they claim. As Lord M'Laren well says in his judgment: "If the right claimed by the United Breweries be well founded, the principle obviously admits of indefinite extension, and there is no reason why a purchaser from the United Breweries, under a contract which is unimpeached, should not have the same right of action against Mr. Molleson which the United Breweries have according to the conception of their claim." I would myself have inferred very clearly from the pleadings and the judgment referred to that this suit was sought to be maintained without any intention of offering restitution; and notwithstanding the argument for the appellants, I am by no means satisfied that any such intention has at any time been very clearly entertained. It is certainly not expressed in the pleadings.

The whole judgment of Lord M'Laren proceeds on the clear basis—repeated more than once and never contradicted—that rescission was sought without any offer of restitution, and that a right of relief was sought by him who was at the same time seeking to retain a benefit procured by what is now assailed as a fraud. An effort has been made in argument to impeach the contract between Dunn and the United Breweries. But no such case is made in the pleadings, and I think that it is quite unsustainable in argument, and, as far as I can see, unsupported on the facts in evidence in the case.

LORDS MACNAGHTEN and MORRIS, concurred.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, March 9, 1894.

Agents for appellants: *Nicholson, Graham & Graham, for Philip Laing & Co., S.C.C., Edinburgh.*

Agents for respondents: *Faithfull & Owen, for Davidson & Syme, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1894
March 13.

THOMAS WILSON, SONS & CO. ("THE OTTO") . . . . APPELLANTS;

AND

JAMES CURRIE AND OTHERS ("THE THORSA") . . . . RESPONDENTS.

Ship—Collision—Regulations for Preventing Collisions at Sea, August 11, 1894, *Articles* 15, 18, 19, *and* 21.

The steamships *Thorsa* and *Otto* were approaching each other, generally speaking, on opposite courses in daylight in a narrow channel. In a manœuvre by the *Thorsa* to pass another vessel, the *Thorsa* and *Otto* became nearly end on. When about a mile apart, the *Thorsa* signalled that she was going to starboard, and at the same time put her helm to port to pass the *Otto* on the port side. This brought her head nearly a point to starboard. The *Otto* heard, but kept a steady course. Two minutes or so afterwards, when the ships were within half a mile, the *Thorsa* repeated the signal, and again ported her helm. The *Otto* immediately afterwards starboarded her helm, bringing her head to port, and went across the bows of the *Thorsa*. The *Thorsa* immediately stopped and reversed, but she ran into and sank the *Otto*. The owners of the *Otto*, while admitting that their vessel had been in fault, alleged fault also against the *Thorsa* in not stopping and reversing at an earlier period:—

Held, affirming the decision of the Second Division of the Court of Session (20 Court Sess. Cas. 4th Series (Rettie), 876), that no fault was attributable to the *Thorsa*.

APPEAL from the Second Division of the Court of Session, Scotland (1), in conjoint actions of the owners of the *Thorsa* against the owners of the *Otto* and vice versâ, for damages in respect of a collision between those vessels.

The facts are stated in the opinion of Lord Herschell, L.C. It need only be added that the proof established that the *Thorsa* on the day of the collision was steaming southwards at full speed (11½ knots) on her way from Christiansand to Copenhagen, and that the *Otto* was proceeding in the opposite direction from Dantzig to Grimsby at full speed (8 knots); that the collision occurred about a cable's length to the eastward of the Lappegrund lightship at about the narrowest part of the Sound.

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(1) 20 Court Sess. Cas. 4th Series (Rettie), 876.

The Lord Ordinary (Wellwood) on the 3rd of March, 1893, found that the collision was caused through the fault of the *Otto* and the *Thorsa.* The owners of the *Thorsa* reclaimed, and the Second Division, on the 23rd of June, 1893, recalled the Lord Ordinary's interlocutor, and held that the collision was caused solely through the fault of the *Otto.*

On appeal,

1894. March 13. Sir *Walter Phillimore,* Q.C. (with him *Aspinall*), for the appellants:—

The facts shew that the *Thorsa* was also to blame. She was aware a considerable time before the collision of the danger, and should have stopped and reversed sooner than she did. The proper construction of Articles 15 and 18 of the Regulations is that a vessel shall stop and reverse before it gets into such a position that a collision is inevitable. Where there is time to get out of the way, it is not enough that there is room to navigate the vessels so that they may just pass one another; they ought to be able to pass clear without difficulty or hazard.

[He referred to *The Khedive* (1), *The Bywell Castle* (2), and the *The Earl of Elgin* (3).]

[LORD HERSCHELL referred to *The Tasmania* (4).]

Sir *R. Webster,* Q.C., and *Salvesen* (of the Scotch Bar), appeared for the respondents, but were not called upon.

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(1) 5 App. Cas. 876.

(2) 4 P. D. 219. See also the Regulations for Preventing Collisions at Sea, under Order of Council, Aug. 11, 1884, provided, Art. 15: "If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other."

Art. 18: "Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed or stop and reverse if necessary."

Art. 19: "In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, viz., one short blast to mean, 'I am directing my course to starboard.'"

Art. 21: "In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of each ship."

(3) Law Rep. 4 P. C. 1.

(4) 15 App. Cas. 223.

LORD HERSCHELL, L.C. :—

This is an appeal from an interlocutor of the Second Division of the Court of Session. The Lord Ordinary found that both the *Otto* and the *Thorsa* were to blame for a collision by which the *Otto* was sunk. The Inner House, reversing this judgment, held that the *Otto* alone was to blame, and that the *Thorsa* was not to blame. No attempt has been made to impeach the finding of the Court below with regard to the *Otto*, and indeed any such attempt would have been useless, because it is perfectly clear that the *Otto* was very seriously to blame.

The vessels were proceeding upon, generally speaking, opposite courses, the one up and the other down. The *Otto* had left her pilot at Elsinore and was proceeding towards the Lappegrund lightship. Shortly before the time with which your Lordships have to deal a vessel called the *James Malam*, which was coming in the same direction as the *Otto* and had passed her, also passed the *Thorsa*. Those two vessels passed starboard to starboard. After a manœuvre by the *Thorsa* had been executed for the purpose of passing clear of the *James Malam* the view taken by the Lord Ordinary and by the Inner House is that the two vessels, the *Thorsa* and the *Otto*, were end on, or nearly end on. The *Thorsa* blew one blast, in order to indicate to the *Otto* that she was going to the starboard. She ported her helm in accordance with the indication which she had given by her whistle; and there seems to be no question that the sound of her whistle was heard on board the *Otto*. There is some doubt as to whether the *Otto* at that time had ceased starboarding (she undoubtedly had been starboarding) and was keeping a steady course, or whether she was altering her course. It is not necessary to determine that question. According to the account of the master of the *Otto*, she was keeping a steady course.

The *Thorsa*, observing that the *Otto* was coming towards her and was not executing the corresponding manœuvre which the master of the *Thorsa* had been led to expect she would execute, blew the whistle again and again ported. Almost immediately afterwards the *Otto* hard-a-starboarded, coming across the *Thorsa*. It is not disputed that as soon as that manœuvre was observed the master of the *Thorsa* directed that her engines should be stopped and reversed, and that his order was obeyed; and no complaint is made of the conduct of the master of the *Thorsa* in not stopping and reversing earlier than he did after the hard-a-starboarding manœuvre was observed. But it is said (and this is the only case now made against the *Thorsa*) that she ought to have stopped and reversed at an earlier period; that when, at some time between the first whistle and the second, the master of the *Thorsa* saw that the *Otto* was not so manœuvring as to bring her port-side to port-side, it ought to have been seen then that there was a risk of collision, and that accordingly then the master of the *Thorsa* ought to have stopped and reversed.

Now, it is by no means clear upon the evidence that, supposing the two vessels had kept their courses after the first whistle, and that last manœuvre, the hard-a-starboarding of the *Otto*, had never taken place, the two vessels under those circumstances would not have passed each other without collision or danger. That they would have done so is stated by the master of the *Thorsa*. Sir Walter Phillimore, on behalf of the appellants, suggests that they would have passed very close to one another, that it would have been a very fine thing, and that it would have been doubtful whether they would have passed clear. But it appears to me that the case of the *Thorsa* does not rest, and ought not to be rested, solely upon the question thus put. The master of the *Thorsa* a second time gave a signal to the *Otto* that he was intending to go to the starboard. Now, it is not denied that the vessels were able to see one another. They were manœuvring with the knowledge, as far as vessels ever can have it, of what was going on in the meantime; and if the story of the *Thorsa*, which has been practically accepted by the Court below, is anything like correct, namely, that the two vessels, supposing their courses had not been changed, would have passed clear, although it might have been a near thing—it is obvious that under those circumstances, if the *Otto* had taken the step she ought instead of starboarding when she got that second signal, there would have been no collision whatsoever.

Now, under the circumstances which existed, it appears to me that the master of the *Thorsa* was justified in giving that second signal before taking any other step, and that he was justified in porting after giving that second signal to see whether the master of the *Otto* would not manœuvre in the manner in which proper navigation demanded that he should. Considering that it is by no means clear that the two vessels would not have passed each other with perfect safety if they had kept their courses, the master of the *Thorsa* was not bound to stop and reverse, but had a right to see whether the master of the *Otto* was going to manœuvre as he ought to have done. As soon as he saw that the *Otto* had starboarded, he stopped and reversed. It appears to me certain that in this case the rule which has been relied upon by the learned counsel for the appellants has not been violated by the *Thorsa*, and that she is consequently not to blame. I certainly do not desire to countenance the idea that a vessel is entitled to run the matter very fine and to go on until the last moment before stopping and reversing; but in the present case it seems to me that the master of the *Thorsa*, knowing the facts which existed and in the circumstances which had been observed by him, acted as reasonably as a seaman could, and did not fail in his duty in any way whatsoever.

For these reasons I move that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

Was the Master of the *Thorsa* when he ported a second time justified in assuming that the action of his helm would be sufficient to determine the risk of collision with the *Otto* without the necessity of stopping and reversing? The decision of this appeal one way or another depends, in my opinion, upon the answer to be given to that question. I have no difficulty in answering the question in the same way as the learned judges of the Second Division have practically done. I do not think the master of the *Thorsa* was bound to assume that the *Otto*, though she had disregarded his first would pay no attention to his second signal, and would not keep out of the way by going to the starboard. Upon the evidence, which on that point is all one way, I see little reason to doubt that, had the *Otto*, after the second signal from the *Thorsa*, kept on her course, the vessels would have passed clear of each other. The collision was, in my opinion, entirely due to the unseamanlike navigation of the *Otto*; and I am therefore of opinion that the judgment appealed from ought to be affirmed.

LORD HALSBURY:—

I am of the same opinion. There are two vessels practically on opposite courses, both intending to pass the lightship at about the same point; and the only blame that can be properly attributed to the *Thorsa* is that she did not stop and reverse in time to prevent the collision. That of course is a question which must always depend upon the circumstances of the particular case, and I am not helped by any canon which has been laid down beyond this, that people must behave reasonably with respect to the course they are pursuing when they come into proximity to each other, which may be the result of the course they are following. Looking at what the *Thorsa* did, it appears to me that she acted reasonably throughout. There was no reason why she should not keep on the course she was pursuing; and when she gave a signal which was not attended to, and gave a second signal, I think she might calculate that a seaman using ordinary care would attend to it. The time, of course, becomes very material. So far as I can form a judgment of the time that elapsed, when at last it was apparent to the master of the *Thorsa* that the master of the *Otto* was going to manœuvre as he ought not to have done, the former did what he ought to have done—he stopped and reversed; but it was too late to prevent the collision, which I think was caused by the persistent conduct of the master of the *Otto* throughout.

LORDS ASHBOURNE, MACNAGHTEN, and MORRIS concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 13th March, 1894.

Agents for appellants: *Pritchard & Sons, for J. & T. W. Hearfields & Lambert, Hull.*

Agents for respondents: *Thomas Cooper & Co., for Beveridge, Sutherland, & Smith, S.C.C., Leith.*

[PRIVY COUNCIL.]

J. C.* 1894 Jan. 18.

JONES . . . . DEFENDANT;

AND

STONE . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Law of Western Australia—Practice in Ejectment—Order XIV. *of Supreme Court Rules—Order for Plaintiff to sign Judgment reversed.*

Where the plaintiff in ejectment claimed that the defendant was estopped by payment of rent from disputing his title:—

Held, that the defendant, who alleged receipt of rent by the plaintiff as collector, was entitled to defend on the merits in the ordinary course, and that the Court was wrong in allowing judgment to be signed by the plaintiff under Order XIV.

APPEAL from an Order of the Full Court (Oct. 20, 1891), affirming an order (April 20, 1891) of a judge in chambers allowing the respondent to sign final judgment in an action of ejectment.

The judge held that the appellant had disclosed no reasonable ground of defence, for he had attorned tenant to the respondent.

Stone, J., took the same view in appeal. Onslow, C.J., on the other hand, held that there were issues of fact to be determined, and that Order XIV. of the Rules of Court did not apply.

W. E. Vernon, for the appellant.

Lewis Thomas, and *W. D. B. Herbert*, for the respondent.

[Reference was made to *Wallingford* v. *Mutual Society* (1); *Ray* v. *Barker* (2); *Casey* v. *Hellyer* (3).

* *Present:*—LORD WATSON, LORD HALSBURY, LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, and LORD JUSTICE DAVEY.

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(1) 5 App. Cas. 685, 693. (2) 4 Ex. D. 279.

(3) 17 Q. B. D. 97.

J. C.
1894
JONES
v.
STONE.

The judgment of their Lordships was delivered by

LORD HALSBURY :—

The sole question at issue here is whether, on certain facts disclosed in affidavits filed by the parties in an action of ejectment commenced by the respondent against the appellant in the Supreme Court, it was a case proper for the application of Order XIV. of the Rules of the Supreme Court of Western Australia, which is in terms identical with Order XIV. of the Rules of the Supreme Court in England, under which the judge may in certain circumstances make an order empowering a plaintiff to sign judgment on a writ specially indorsed.

The affidavits appear to disclose that the plaintiff in this case, who asserts his title to certain property, has this connection with the property, that his mother for some time received rents in respect of it and that he has also himself received them. The question which is debated on the face of the affidavits is, in what character those rents were received. On the one hand it is said on behalf of the plaintiff, that the defendant, who was let into possession of the property, not by the present plaintiff, but by the present plaintiff's mother, was let into possession by her, she claiming the property in her own right. The affidavits in support of this view are anything but clear; but their Lordships will assume, for the purpose of this appeal, that it is to be inferred from them that the plaintiff's mother did purport to exercise her right over the property in the manner above stated. On the other hand, the defendant, whilst allowing that he did, in fact, so pay rent for the property for some years, contended that the ground upon which he did so was that the person to whom he paid it purported to act as collector on behalf of a person of the name of Atkinson, who was rated for it, and who was its real owner.

Nothing is distinctly alleged in support of the plaintiff's title to the property. The learned counsel, who very strenuously argued the appeal on the plaintiff's behalf, urged upon their Lordships the view that the plaintiff was not called upon to set out his title, because his claim against the defendant was that he had let him into possession of the property as his tenant; that he had given the defendant notice to quit; that the defendant was no longer his tenant; and, therefore, that he was entitled to turn him out of the property by an action of ejectment, the defendant being estopped by his conduct in paying rent from denying the plaintiff's title. The fact that a plaintiff in ejectment must establish his own title is clear; but the plaintiff in this case argues that he is relieved from the necessity of proving his title by reason of the alleged estoppel. This might be a very legitimate argument if the facts were sufficient to establish such a proposition. But it is enough to say, for the purpose of this case, that these facts are the very facts in dispute.

The Chief Justice of the Supreme Court, who dissented from the order of the Court giving the plaintiff liberty to sign judgment, remarked in his judgment that the case seemed to him to be "eminently one which required the fullest investigation before a jury, as the conduct of the plaintiff in his dealings with the defendant in connection with the land in question was of a most suspicious character." Whether that is so or not, it is abundantly clear to their Lordships that there are very serious questions of fact in debate which never ought to have been determined in a summary manner under Order xiv. The proceeding established by that order is a peculiar proceeding, intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay. The present case is not one of that kind; and their Lordships cannot do otherwise than regret that the action was not allowed to be defended on its merits in the ordinary course, in which event the expense and delay of the present appeal to the Privy Council would have been avoided.

Their Lordships will humbly advise Her Majesty to reverse the order for judgment of the 20th of April, 1891, the judgment of the 23rd of April, 1891, the order of the Full Court of the 20th of October, 1891, and all other orders and judgments of the Court which are in the way of the trial of the case. The respondent must pay the costs in both the Courts below and the costs of this appeal.

Solicitors for appellant: *John Vernon, Son, & Stephen.*

Solicitor for respondent: *W. H. Herbert.*

[PRIVY COUNCIL.]

HILL AND ANOTHER . . . . DEFENDANTS;

AND

BROWN . . . . PLAINTIFF.

J. C.*
1894
Jan. 23, 24.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Law of Wills before 1840—*Construction—Words of Gift without Limitation.*

By English law of wills as it existed prior to 1 Vict. c. 26, words of gift conveyed only a life estate unless the devise contained words of limitation.

Although the word "estate" or "property" or its equivalent, used in the operative part of the devise, would enlarge the gift; when used in another part of the will as a word of reference merely, it has not that effect.

APPEAL from an order of the Supreme Court (March 23, 1892), discharging with costs a rule nisi to set aside a verdict for the original respondent W. M. Thorley, who sued as administrator of William Thorley, deceased, and to enter the same for the appellant.

The verdict for the original respondent was at the trial of the action which was in ejectment entered for him by consent subject to a point of law, viz., whether on the construction of the will (which was before 1840, when the English Wills Act was adopted in the Colony) of Samuel Thorley, the original grantee of the lands from the Crown, his daughters took an estate in fee simple or for life.

The appellants obtained a rule nisi on the ground that Samuel Thorley's daughters, under whom they claimed, took an estate in fee simple under his will. This rule was discharged with costs. Subsequently the respondent Brown was substituted as plaintiff.

The terms of Samuel Thorley's will are sufficiently given in the judgment of their Lordships.

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* *Present*:—LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

J. C.
1894
Hill
v.
Brown.

Byrne, Q.C., and *Sargant*, for the appellants, contended that the daughters of Samuel Thorley took an estate in fee simple in the hereditaments devised by his will to them respectively. When the terms of the will are referred to it appears that in each case the devise of lands was inseparably coupled with an absolute bequest of personalty. Also that in the clause immediately following the devises, the word "property" was used in connection with and in relation to such devises. This was material, as shewing the intention of the testator to pass to his devisees his whole estate and interest in the lands devised.

Reference was made to *Clifford* v. *Koe* (1); to a dictum of Lord Blackburn on p. 466; *Randall* v. *Tuchin* (2); *Uthwatt* v. *Bryant* (3); *Doe* v. *White* (4); *Doe* v. *Fricker* (5); *Ibbetson* v. *Beckwith* (6).

The *Solicitor-General* (Sir *J. Rigby*), *Crackanthorpe*, Q.C., and *Badcock*, for the respondent, contended that there were no words of limitation in the actual devises, and as the law applicable was that prevailing in England before 1 Vict. c. 26, the devisees only took for life. There was no rule of construction under the old law which enlarged the effect of a devise without words of limitation, either because it was coupled with an absolute bequest of personalty, or because the subject of the devise is elsewhere in the will described as property, the context of the word when used shewing that description and not disposition was the object in view.

Reference was made to *Doe* v. *Clayton* (7); *Pettiward* v. *Prescott* (8); *Harding* v. *Roberts* (9); *Bowen* v. *Scowcroft* (10); *Gatenby* v. *Morgan* (11).

Byrne, Q.C., replied.

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(1) 5 App. Cas. 447, 466.
(2) 6 Taunt. 410.
(3) 6 Taunt. 317.
(4) 1 Ex. 526; S.C., 2 Ex. 797.
(5) 6 Ex. 510.
(6) Cas. t. Tal. 157, 160.
(7) 8 East, 141, 147.
(8) 7 Ves. 541.
(9) 10 Ex. 819.
(10) 2 Y. & C. Ex. 640.
(11) 1 Q. B. D. 685.

J. C.
1894
HILL
v.
BROWN.

1894. Jan. 24. The judgment of their Lordships was delivered by

LORD MACNAGHTEN :—

It is common ground that the testator's will must be construed as an English will in the same terms would have to be construed in this country under the old law.

As the law stood before the present Wills Act, 1 Vict. c. 26, which was adopted in the Colony in 1840, a testamentary gift of so much land by an absolute proprietor as a general rule carried only a life estate, unless the devise contained words of limitation.

To this rule, which probably in almost every case must have disappointed the wishes of the testator, there were certain exceptions. One was that the fee would pass if the testator used the word "estate," or any equivalent expression capable of describing the extent and sum of the testator's interest, as well as the substance of the gift. But this exception was subject to the qualification that the expression must be found in the operative part of the devise in order to have the effect of enlarging the gift. These propositions, in regard to which it is only necessary for the purpose of this case to refer to *Doe* v. *Clayton* (1), and *Burton* v. *White* (2), were not disputed at the Bar. The real contest was whether in the present case the operative part of the devise could properly be construed so as to include the expression upon which the appellants relied as enlarging a gift which it was admitted primâ facie carried only a life estate.

The testator's will seems to have been written into a skeleton form, intended to be made applicable either to a will in short general terms, referring to a schedule for the names of the beneficiaries and the particulars of the property given to each, or to a will complete in itself, the reference to a schedule in that case being struck out. The testator appears to have attempted to combine the two forms. After a preamble to which it is not necessary to refer, the will begins with the words "I do give and bequeath." Those words occur once and once only. They

(1) 8 East, 141.

(2) 1 Ex. 526; 2 Ex. 797.

are carried on and apply to all the devises, which are seven in number, and all in the same form—gifts of so many acres of land to such and such a person without more. At the end of these devises occur the following words: "and whose names are in the schedule named and property specifically mentioned to each of their respective names." The left hand margin of the paper on which the will is written is headed "Schedule" and under the word "Schedule" are written the names of the devisees. But the schedule does not contain the particulars of any property given to the devisees named in the will.

The question then is—do the words which have been read, properly speaking, belong to the operative part of the devise or not? They are evidently not intended of themselves to pass anything. They refer to gifts already made. They refer to the schedule as containing or recapitulating the names of the beneficiaries, and they refer either to the schedule as recapitulating the particulars of the property left to each beneficiary, or to the previous part of the will which contains those particulars. In either case it seems to their Lordships that the words in question, though they occur before the testator comes to a full-stop, are, properly speaking, words of reference and not words of gift. If they are taken to refer to the schedule for the particulars of the devises the schedule in this respect is a blank, and it is impossible to guess what the testator would have written in it. If they refer to the previous part of the will, which is perhaps the view most favourable to the appellants, it is difficult to see how apt words of reference, the office of which is to carry the reader's mind to gifts to be found somewhere else, can have the operation of enlarging those gifts: and it is admitted that upon the authorities the word "estate" or the word "property," used as a word of reference, cannot be treated as explaining a previous gift which primâ facie carries only a life estate.

The other points referred to in the argument—the fact that one of the devisees was the heir-at-law, and the fact that each devisee took an absolute interest in some personal property—are not of themselves sufficiently substantial to affect the question.

Their Lordships therefore will humbly advise Her Majesty to affirm the judgment of the Supreme Court discharging the rule nisi; to direct the verdict entered by consent for William Miller Thorley to be entered for the respondent, Elizabeth Brown; and to order the appellant to pay to William Miller Thorley his costs of this appeal incurred in the Supreme Court, and to pay to Elizabeth Brown her costs of this appeal incurred in England.

J. C.
1894
HILL
v.
BROWN.

Solicitor for appellants: *G. P. Slade.*
Solicitors for respondent: *Hunters & Haynes.*

[PRIVY COUNCIL.]

WILSON . . . . APPELLANT;

AND

McINTOSH . . . . RESPONDENT.

J. C.*
1894
Jan. 18;
Feb. 10.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Application to bring Lands under 26 *Vict. No.* 9—*Caveat—Waiver of Lapse under sect.* 23.

Where an applicant to bring lands under the Real Property Act (26 Vict. No. 9) filed his case in Court under sect. 21, more than three months after a caveat had been lodged, and thereafter obtained an order that the caveator should file her case, which she accordingly did:—

Held, that he had thereby waived his right to have the caveat set aside as lapsed under sect. 23.

Phillips v. *Martin* (11 N. S. W. L. R. 153) approved.

APPEAL from an order of the Supreme Court (Aug. 8, 1890), removing a caveat lodged by the appellant.

The facts and proceedings are stated in the judgment of their Lordships.

J. Ashton Cross, for the appellant.

The respondent did not appear.

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* *Present*:—LORD WATSON, LORD HALSBURY, LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, and LORD JUSTICE DAVEY.

1894. Feb. 10. The judgment of their Lordships was delivered by

LORD JUSTICE DAVEY:—

In this case their Lordships are under the disadvantage of not having had the case of the respondent argued by counsel on his behalf. They will therefore abstain from any expression of opinion on the points argued for the appellant beyond what is strictly necessary for the decision of the appeal. The facts of the case are as follows:—

On the 8th of January, 1887, the present respondent lodged an application in the office of the Registrar General to bring under the Real Property Act (26 Vict. No. 9) certain lands comprising about 40 acres. The applicant's title (it is alleged) depended on the will of one Cornelius Sheehan, a former owner of the lands, whereby he devised his real estate to his then wife Isabella Sheehan for life with remainder to the applicant in fee. In his declaration in support of the application he declared that there was no person in possession or occupation of the said lands adversely to his estate or interest therein, and (in general terms) that there did not exist any fact or circumstance whatever material to the title which was not thereby fully and fairly disclosed to the utmost extent of the applicant's knowledge, information, and belief. On the 12th of May, 1887, the present appellant duly lodged a caveat against the land being brought under the provisions of the Act; but she did not take any proceedings to establish her title to the land or apply for an injunction restraining the Registrar General from bringing the land under the provisions of the Act. The appellant denied the title of the respondent on the allegation that Isabella Sheehan, the former wife of the testator Cornelius Sheehan, died in his lifetime, and that the testator had subsequently married again and thereby revoked his will, and she further alleged that she and those through whom she claimed had acquired a title to the land by possession under the Statute of Limitations.

On the 1st of November, 1887, and more than three months after the lodging of the caveat the respondent, in pursuance of sect. 21 of the Real Property Act (Amendment Act), stated a case for the opinion and direction of the Supreme Court, and the same was duly filed. On the 4th of November, 1887, the respondent applied for and obtained an order of the Court directing the appellant to state and file a case on her behalf, and in compliance with such order the appellant, on the 18th of November, 1887, stated and filed a case accordingly. The respondent took no steps to have issues settled, or to have the case set down for argument before the Court, or to obtain the decision of the Court on the questions thereby raised between the parties, and in fact the respondent, having obtained from the appellant a statement of her case, did not further proceed with his application. But on the 24th of July, 1890, the respondent served the appellant with notice of motion to have the appellant's caveat set aside and removed, on the ground that the appellant, having failed to take any proceedings within three months after filing of the caveat as provided by sect. 23 of the Real Property Act, the caveat had lapsed. It appeared from the appellant's affidavits in opposition to the motion that on the 8th of May, 1888, her solicitor inquired by letter what the respondent intended to do in the matter, and whether he intended proceeding with the case, and not having received any answer he sent his clerk to inquire, and the clerk stated that the respondent's solicitor informed him there was some dispute between him and his client as to costs, and gave the clerk to understand he would have nothing more to do with the matter. On the other hand, the respondent's present solicitor made an affidavit of his belief that the client was not aware until recently that the appellant had not obtained an injunction. On the 8th of August, 1890, an order was made removing the caveat which is the subject of the present appeal.

The material sections of the Real Property Act are the 22nd and 23rd, which are in the following terms:—

"The Registrar General upon receipt of any such caveat within the time limited as aforesaid, shall notify the same to such applicant proprietor and shall suspend further action in the matter, and the lands in respect of which such caveat may have been lodged shall not be brought under the provisions of this Act, until such caveat shall have been withdrawn or shall have lapsed from any of the causes hereinafter provided, or until a decision shall have been obtained from the Court having jurisdiction in the matter."

"After the expiration of three months from the receipt thereof every such caveat shall be deemed to have lapsed unless the person by whom or on whose behalf the same was lodged, shall within that time have taken proceedings in any Court of competent jurisdiction to establish his title to the estate interest lien or charge therein specified, and shall have given written notice thereof to the Registrar General, or shall have obtained from the Supreme Court an order or injunction restraining the Registrar General from bringing the land therein referred to under the provisions of this Act."

In sect. 4 of the Amending Act (41 Vict. No. 18) it is provided:—

"Where any caveat against an application to bring land under the principal Act shall have been lodged in pursuance of the twenty-first section by any person (hereinafter called the caveator) claiming such land or a portion thereof or an interest therein adversely to the applicant, it shall not be necessary for such caveator to take proceedings in any Court to establish such claim, but the applicant may state a case for the opinion and direction of the Supreme Court upon the matter, and the caveator may apply to the said Court for an order on the Registrar General as provided by the twenty-third section to restrain him from proceeding until the further order of the Court. And the Court may make such an order and may in its discretion direct the caveator to lodge in the Court on or before a certain day a case on his own behalf, stating whether he claims in his own right or under another person, together with such other particulars (if any) as the Court shall think fit to order, and the Court shall thereupon direct an issue or issues to be tried by a jury as to any fact or facts, or should no fact be in contest may decide the matter upon the case stated, and for the purposes aforesaid may make all such orders as the Court shall think fit, and the decision of the Court finally upon the matter shall be conclusive on the parties and on the Registrar General and commissioners. And the costs of every proceeding under this section shall be borne by the party finally unsuccessful."

Their Lordships are of opinion that the limitation of time contained in sect. 23 is introduced for the benefit of the applicant, to enable him to obtain a speedy determination of his right to have the land brought under the provisions of the Act without being embarrassed by the filing of a caveat which is not proceeded with in due time. It was argued on behalf of the appellant, that the effect of sect. 4 of the Amending Act is to prevent the lapse of the caveat by reason of the caveator not taking any proceeding, inasmuch as it is thereby provided that, "it shall not be necessary for such caveator to take proceedings," and liberty is given to the applicant to take the initiative by stating a case, and no time is limited within which the case must be stated. Their Lordships do not think it necessary to express any opinion upon this point or upon the question whether, if the caveat has lapsed, the caveator is concluded and deprived of every other means of asserting her title. Their Lordships are of opinion that the maxim "Quilibet potest renunciare juri pro se introducto" applies to this case, that it was competent for the applicant to waive the limit of the three months and the lapse of the caveat by sect. 23, and that the respondent did waive it by stating a case and applying for and obtaining an order upon the appellant to state her case, both which steps assumed and proceeded on the assumption of the continued existence of the caveat. In holding that it was competent for an applicant to waive the lapse, their Lordships do not understand that they are differing from the learned judges in the Court below. In *Phillips* v. *Martin* (1) the facts were very similar to those in the present case, with the addition that issues had been settled on the cases stated, and had been tried by a jury who found against the applicant, and proceedings had then been taken unsuccessfully for a new trial ending in an appeal to this Board. In the course of his judgment on that case the Chief Justice said: "Here there is abundant evidence of waiver, and it is quite clear that a man may by his conduct waive a provision of an Act of Parliament intended for his benefit. The caveator was not brought into Court in any way until the caveat had lapsed. And now the applicant, after all these proceedings have been taken by him, after doubtless much expense has been incurred on the part of the caveator, and after lying by and hoping to get a judgment of the Court in his favour, asks the Court to do that which but for some reasons known to himself he might have asked the Court to do before any other step in the proceedings had been taken. I think he is altogether too late. It is to my mind a clear principle of equity, and I have no doubt there are abundant authorities on the point, that equity will interfere to prevent the machinery of an Act of Parliament being used by a person to defeat equities which he has himself raised, and to get rid of a waiver created by his own acts."

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(1) 11 N. S. W. L. R. 153.

Their Lordships agree with these observations of the Chief Justice, and think that they apply to the present case, notwithstanding that the respondent did not think fit to obtain a decision of the Court on the case which he had compelled the present appellant to state. Windeyer, J., distinguished the case of *Phillips* v. *Martin* (1) from the present case, on the ground that the case has not gone so far as it went in *Phillips* v. *Martin* (1). The learned judge said: "In *Phillips* v. *Martin* (1) the applicant brought the case before this Court, and obtained a decision, and from that decision he unsuccessfully appealed to the Privy Council, and that case was decided upon the clear principle of law that where, although the Court has no jurisdiction, the parties have allowed it to exercise jurisdiction and to go to the length of pronouncing judgment, the unsuccessful party cannot then turn round and deny the jurisdiction of the Court. That principle, however, has no application in the present case."

Their Lordships cannot regard these circumstances as making any difference in principle. The respondent in the present case invoked the jurisdiction of the Court to compel the appellant to state her case, and the appellant did so, and no doubt incurred costs in doing so, and all the risk involved in shewing her title. If it be once admitted that an applicant may waive the lapse, it

(1) 11 N. S. W. L. R. 153.

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is a question of fact on the circumstances of each case whether there has been a waiver or not. Their Lordships agree with the observations of Stephen, J., on this part of the case. Their Lordships will therefore humbly advise Her Majesty that the order appealed from be reversed and the original motion refused with costs. The respondent must also pay the costs of this appeal.

Solicitors for appellant: *Parker, Garrett, & Parker.*

[PRIVY COUNCIL.]

THE ADMINISTRATOR GENERAL OF JAMAICA . . . . APPELLANT;

AND

LASCELLES, DE MERCADO & Co. . . RESPONDENTS.

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Dec. 8, 15.
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In re REES' BANKRUPTCY.

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

Law of Jamaica—Jurisdiction to annul an Adjudication of Bankruptcy—Practice—Bankruptcy Law, 1879, *s.* 151—*Act No.* 17 *of* 1877, *s.* 10—*Assignment of the whole of Debtor's Property.*

Held, that the judge sitting in Bankruptcy has jurisdiction to revoke a provisional order, or annul an adjudication under sect. 151 of the Bankruptcy Law, 1879. An application for that purpose need not be made to the Full Court under sect. 10 of No. 17 of 1877:

Held, that an assignment of the whole of the debtor's property, in consideration of a contemporaneous advance, and promise of further assistance, "in order to enable the debtor to carry on his business, and in the reasonable belief that he would thereby be enabled to do so," is not an act of bankruptcy.

Ex parte King (2 Ch. D. 256), *Ex parte Ellis* (2 Ch. D. 797), and *Ex parte Johnson* (26 Ch. D. 338), approved.

APPEAL from an Order of the Supreme Court (August 1, 1892), reversing an order of Nathan, J. (March 22, 1892), and discharging an adjudication in bankruptcy against Rees.

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* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

The provisional order had been made on the 31st of December, 1891, on a petition which alleged a fraudulent assignment by Rees to the respondents on the 2nd of December, meaning the bill of sale hereinafter mentioned. Rees was thereby adjudged a bankrupt, and the appellant became, by virtue thereof, trustee of his property for his creditors. Curran, J., on the 13th of February, 1892, refused to revoke this order, and a subsequent application to the same effect was heard and refused by Nathan, J., who held that the assignment was substantially of the whole of the debtor's property; that it was taken, and payments were made and promised in good faith, and in the belief that Rees was solvent; that such payments were not advances, but were in the nature of repayments to Rees in respect of logwood previously delivered by him; that the business carried on by Rees was not such that its preservation could be a protected purpose within the scope of the later English decisions. There was in his opinion under the arrangement made no equivalent benefit to either Rees or his creditors.

The Solicitor-General (Sir *John Rigby*), and *L. Yate Lee*, for the appellant, contended that the reversal of Nathan, J.'s, order by the Supreme Court was erroneous. A preliminary point was that the respondents were not authorized to apply by motion for the revocation of the provisional order, and could only challenge Curran, J.'s, decision that that order was valid by appeal to the Full Court. According to the practice of the Court, when an application to revoke fails, and the creditors resolve in favour of an adjudication, the provisional order is made absolute: see Law No. 33 of 1879, ss. 143, 151. The appeal is to a Full Court: see Law No. 17 of 1877, s. 10. Reference was made to *Ex parte Tucker* (1), *Ex parte Maugham* (2), and *Ex parte Ellis* (3).

It was contended that the bill of sale of the 2nd of December, 1891, was an act of bankruptcy; for it comprised substantially all the property of Rees, and was not given for any sufficient present equivalent. Its enforcement would have stopped the business entirely. Moreover, the £500 paid to Rees at the date

(1) 12 Ch. D. 308.
(2) 21 Q. B. D. 21.
(3) 2 Ch. D. 797.

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of his agreeing to give the bill of sale did not constitute an advance or operate to prevent the bill of sale from being an act of bankruptcy. That and other payments were not made with the object of enabling Rees to preserve his business, but solely to assist him in carrying out a particular agreement with the respondents, and in sending forward logwood and other things for their benefit. They were, in truth, repayments on account, and the bill of sale was substantially given to secure an antecedent debt. Reference was made to *Hutton* v. *Cruttwell* (1); *Bittlestone* v. *Cooke* (2); *Ex parte Johnson* (3). The case for the appellant does not depend merely on the validity of the bill of sale. The intention of the lender might be material on that issue. He might be protected by establishing his bona fides, and that his debtor had deceived him. The case depends upon whether the transaction was an act of bankruptcy. If the debtor committed a commercial crime its nature cannot be altered by considerations personal to the lender exclusively: see *Lindon* v. *Sharp* (4). [*The Attorney-General* referred to *In re Colemere* (5), as disapproving *Lindon* v. *Sharp* (4).] Reference was also made to *Ex parte King* (6); *Woodhouse* v. *Murray* (7).

The Attorney-General (Sir *C. Russell*), *Cooper Willis*, Q.C., and *Kent*, for the respondents, contended that the order of the Supreme Court was right. The preliminary point—viz., that under sect. 10 of No. 17 of 1877 the application to revoke should have been made in the first instance to the Full Court—though taken before Nathan, J., was not raised in the Court of Appeal. It is not an objection affecting the merits, and Nathan, J., had clearly jurisdiction to annul an adjudication as well as to make one. There was no act of bankruptcy in this case, unless the transaction of the 2nd of December, 1891, was fraudulent within the meaning of the local Bankruptcy Law of 1879. There was no secrecy in the transaction. There were extensive business relations between Rees and the respondents. There was an

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(1) 1 E. & B. 15.
(2) 25 L. J. N. S. (Q.B.) 281; S.C., 6 E. & B. 296.
(3) 26 Ch. D. 346.
(4) 7 Scott, N. R. 730.
(5) Law Rep. 1 Ch. 128.
(6) 2 Ch. D. 263.
(7) Law Rep. 2 Q. B. 634, 638.

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assignment of considerable property on the 2nd of November to secure a pre-existing debt and a further advance. On the 2nd of December another assignment was executed in consideration of a further advance, and of an agreement to make yet further advances. The later assignment was to be in substitution for the former. The advances were proved to have been made bonâ fide for the purpose of enabling the debtor to continue his business of a logwood dealer, and to realize his business of an ironmonger and hardware dealer. The respondents believed that that purpose would be effected by their advances, and had good grounds for so believing. No doubt there is a question in all such cases whether the advance is bonâ fide, or to protect past advances, but here the evidence shewed that they were not intended to give colour only to a security for a pre-existing debt: see *Lomax* v. *Buxton* (1), dissenting from *Graham* v. *Chapman* (2); *Ex parte King* (3).

With regard to the promise of future advances, see *Ex parte Winder* (4); *Ex parte Wilkinson* (5). With regard to the view that these were not advances, but repayments in respect of logwood delivered, either way they were voluntary, and were moneys paid to Rees in consideration of the assignment, and to enable him to continue his business. Unless they had been made Rees would have been unable to carry on business. Reference was made to the other cases cited by the appellant, and to *In re Colemere* (6).

Yate Lee, replied, citing *Ex parte Dann* (7).

1894
Feb. 3

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

This is an appeal from an Order of the Supreme Court of Jamaica, dated the 1st of August, 1892, discharging an adjudication in bankruptcy against one Rees, a logwood dealer and storekeeper. A provisional order in bankruptcy was made against Rees on the 31st of December, 1891, followed by an absolute order on the 22nd of March, 1892. The act of bankruptcy upon which these orders were founded was the execution of a bill of sale in favour of the respondents, Lascelles, De Mercado & Co. on the 2nd of December, 1891, which was held by the judge in bankruptcy to be a fraudulent assignment. On the 12th of January, 1892, the respondents gave notice of motion to set aside the provisional order. After several adjournments the application was dismissed by Nathan, J., sitting in bankruptcy on the 22nd of March, 1892, the day on which the order absolute was made. On appeal the order of Nathan, J., was reversed, and it was held by a majority of the Full Court, consisting of Sir A. Gib Ellis, C.J., and Northcote, J., Nathan, J., dissenting, that the bill of sale was not fraudulent. And the orders in bankruptcy were consequently discharged.

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(1) Law Rep. 6 C. P. 107.
(2) 12 C. B. 85; 21 L. J. C. P. 173.
(3) 2 Ch. D. 256.
(4) 1 Ch. D. 290.
(5) 22 Ch. D. 788.
(6) Law Rep. 1 Ch. 133.
(7) 17 Ch. D. 26.

It was objected before their Lordships that the application of the respondents ought to have been made in the first instance to the Full Court under sect. 10 of the Bankruptcy Jurisdiction Amendment Law, No. 17 of 1877. This objection was taken before Nathan, J., and disallowed by him. The point does not seem to have been raised in the Court of Appeal when the error in procedure, if it was an error, might easily have been set right. At any rate it is not noticed in the judgments delivered on the appeal. Their Lordships would be slow to give effect to any objection not affecting the merits of the case, unless it were reasonably clear that it had been pressed in the Court below. But they think it right to add that they see no ground for limiting the power of the Court exercising jurisdiction in bankruptcy to revoke a provisional order or annul an adjudication under sect. 151 of the Bankruptcy Law, 1879.

Happily there is no conflict of evidence in this case. Nor can there be any doubt as to the law to be applied. The decisions of the Court of Appeal in England in *Ex parte King* (1), *Ex parte Ellis* (2), and *Ex parte Johnson* (3), are in point. And notwithstanding the criticism of the learned counsel for the

(1) 2 Ch. D. 256.
(2) 2 Ch. D. 797.
(3) 26 Ch. D. 338.

appellant their Lordships think those decisions good sense and good law.

The facts of the case may be stated very shortly.

By an agreement dated the 4th of June, 1891, Rees agreed to sell and the respondents agreed to buy a minimum quantity of 3000 tons of logwood and logwood roots deliverable on an average of 500 tons a month. It was further agreed that all logwood and logwood roots over and above the 3000 tons which Rees might buy, or which he might cut or dig during the term of the agreement, should be supplied by Rees to the respondents, save and except such quantities as he might require for his existing contracts with other parties. The prices of roots and straight wood were fixed on the basis of the prices then ruling in the United States. It was however provided that if the market should decline, the price should be reduced correspondingly, so as to secure the respondents a net profit of 5*s.* per ton; and that if the market should advance, or if the respondents should make sales by which the net profit should exceed 5*s.* per ton, half of such extra profit should be paid to Rees. The wood and roots were to be consigned to the respondents, and they agreed to pay Rees such money as he might require from time to time, but their advances were not to exceed a total sum of £2000 uncovered. The agreement was to expire on the 31st of December, 1891, when Rees was to square any balance that might be at his debit in the respondents' books.

It seems that Mr. Charles De Mercado was the member of the firm of Lascelles, De Mercado & Co. who negotiated the contract of the 4th of June and managed the business. Shortly afterwards he went to the United States. On his return in August he found that Rees had drawn upon his firm in excess of the limit specified in the agreement. The respondents, however, continued to make advances to Rees during the month of September. The advances stipulated for in the agreement were intended to enable Rees to purchase logwood for the purposes of the contract. When Rees was taxed with making short deliveries he declared that he had any quantity of logwood, but that the rains prevented it being sent down. His contract, he said, would be kept at the end of December. Later on, however, he admitted that some of the respondents' money had gone to buy drays, harness, and mules, and that some had gone to pay for an ironmonger's business which he had bought. Then Mr. De Mercado insisted on security being given and on more rapid deliveries. All the time Rees assured Mr. De Mercado that he had practically no other creditors, and that he was perfectly solvent. In October Rees produced a memorandum purporting to shew his assets and liabilities. His assets were put down at £11,600 in all. His total liabilities were represented to be £7700, of which the sum of £6200 was owing to the respondents. He was closely questioned, both by Mr. De Mercado himself and by his solicitor, Mr. Farquharson, as to the items in this memorandum, and as to his position generally. He satisfied them both that the memorandum was a true and honest account, and that, although his money was locked up, the value of his assets exceeded his liabilities by nearly £4000. Then Mr. De Mercado advanced him £600 more to pay off an overdraft with his bankers, and on the same day, the 2nd of November, he executed a bill of sale of his drays, harness, and mules, and his stock in trade in the ironmongery business, to cover his indebtedness to the respondents.

During the month of November the deliveries of logwood were rather more satisfactory. On the 30th of that month Rees applied for another advance to pay off an overdraft of £500 with the Colonial Bank. Rees was again questioned by Mr. De Mercado and his solicitor as to his position, and again he succeeded in satisfying them both that he was perfectly solvent. Mr. De Mercado then consented to pay £500 to Rees' account with the bank, and promised to make him further advances if the business worked satisfactorily, on Rees undertaking to execute a fresh bill of sale, which he did on the 2nd of December. This bill of sale included some cattle and mules not included in the former bill of sale, and it is not disputed that it comprised substantially the whole of Rees' available property. In view of the execution of the second bill of sale, the bill of sale of the 2nd of November was not registered.

On the 14th of December the respondents, in accordance with Mr. De Mercado's promise, advanced a further sum of £400.

Towards the end of December they came to hear that Rees owed a Mr. Boettcher £1600, which had been concealed from them. They then took possession under the bill of sale of the 2nd of December, which they duly registered. Rees' credit was destroyed, and shortly afterwards proceedings in bankruptcy were taken against him by an unsecured creditor. It was then discovered that Rees' statements were not true, and that he was hopelessly embarrassed at the time when he entered into the contract of the 4th of June.

There is no question as to the good faith of the respondents. Nathan, J., who tried the case in the first instance, and saw the witnesses, including Mr. De Mercado and Mr. Farquharson, found as a fact that "the assignment was taken, and the payment of £500 and the conditional promise to pay further sums from time to time were made by Mr. De Mercado, in good faith and in the belief that Rees was solvent."

If this finding be correct, as it undoubtedly is, it is difficult to see upon what ground the bill of sale of the 2nd of December can be impeached. It is obvious, as the learned Chief Justice points out in his very able and exhaustive judgment, that the contemporaneous advance was made and the promise of further assistance was given "in order to enable Rees to carry on his business, and in the reasonable belief that he would thereby be enabled to do so."

It was objected indeed that Rees was not carrying on a business properly so called, and that the advances which the respondents made to him were not properly speaking advances at all. In the Court of first instance Nathan, J., relied on both these objections. In the Full Court, in deference to the view expressed by the Chief Justice, he forbore to press the former, though he still insisted on the latter. It is not very easy to understand either objection. A man who traffics in logwood carries on a business, whether he buys the logwood in which he deals or digs it up or cuts it, and the occupation in which he is engaged is not the less a business because he finds it for a time more profitable to consign all his produce to one customer than to offer his wares to the public generally. Nathan, J., came to the conclusion that the payment of the £500, and the further payment to Rees, were not properly speaking advances, but were repayments of part of the value of logwood previously delivered by him under the agreement of the 4th of June. But, as the Chief Justice observes, the respondents were under no obligation to make any repayments at all to Rees. The moneys they paid him—the £500 and the £400—were their own moneys, and came out of their own pocket.

Their Lordships cannot help thinking that the fallacy in the judgment of Nathan, J., is in some measure due to his having taken an erroneous view of the agreement of the 4th of June. He deals with that agreement as bearing on the questions whether there was a business and whether these were advances, and he considers its effect to be that "the whole of the future production of Mr. Rees' logwood trade was validly prospectively assigned." He uses those words, he says, "advisedly, having reference to the decision of the House of Lords in *Holroyd* v. *Marshall* (1); the result being that as each parcel of logwood reached Rees' hands it became the property of Mr. De Mercado." Their Lordships are unable to agree with this view, nor do they think that the case of *Holroyd* v. *Marshall* (1) has any application to the agreement in question.

In the result their Lordships will humbly advise Her Majesty that the appeal must be dismissed.

The appellant will pay the costs of the appeal, including the costs of the application for leave to add certain documents to the record.

Solicitors for appellant: *Cookson, Wainwright, & Pennington.*
Solicitor for respondents: *John Hands.*

(1) Law Rep. 10 H. L. 191.

[PRIVY COUNCIL.]

J. C.*
1893
Dec. 13.
1894
Feb. 3.

WALSH . . . . DEFENDANT;

AND

THE QUEEN . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT OF QUEENSLAND.

Law of Queensland—Dividend Duty Paying Act, 1890, *s.* 9—*Constructive Assets—Foreign Debts charged on Property in the Colony.*

Where debts are due to a company by debtors out of Queensland and will be payable out of Queensland, but are charged upon real and personal property in Queensland:—

Held, that the interest of the company in such property is an asset of the company in Queensland within the meaning of sect. 9 of The Dividend Duty Act of 1890 (54 Vict. No. 10); to the extent at all events of the value of the incumbrance, and taking into account collateral securities held elsewhere than in Queensland for the same debts.

APPEAL from an order of the Supreme Court (June 9, 1892), allowing the respondent's demurrer to the appellant's statement of defence.

The facts are stated in the judgment of their Lordships. The question was as to the true construction of the Dividend Duty Act of 1890, s. 9, as regards the meaning of the words "assets of the company in Queensland" therein.

Finlay, Q C., *Haldane*, Q.C., and *F. Fitzgerald*, for the appellant, contended that in determining the locality of assets of the nature to which this case relates, attention should be given to the locality of the debt, not to the locality of the property charged as a security. The debts in this case, however secured, were payable elsewhere than in Queensland, and consequently their locality was not in the Colony, but at the places where the debtors severally are and should be sued. The properties in

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* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, and SIR RICHARD COUCH.

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the Colony did not constitute assets separate and distinct from the debts to secure which they had been charged. The debts constituted the subject of the assets, and their locality was not in Queensland. The charges or securities were accessory to the debts, the locality of which is unaffected by the locality of the security; the deeds creating them were kept by the appellant out of the Colony; they might be collateral securities for the debts, in respect of which other and sufficient security has been taken elsewhere. They are not assets of the company till the company has enforced or taken steps to enforce them. Until then nothing has been done to render the debts payable in the Colony. Reference was made to *Commissioner of Stamps* v. *Hope* (1).

The Solicitor-General (Sir *John Rigby*), *Cozens-Hardy*, Q.C., and *R. Bray*, for the respondent, were not heard.

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Feb. 3.

The judgment of their Lordships was delivered by

LORD WATSON:—

The Union Mortgage and Agency Company of Australia, Limited, are incorporated, and have their principal office in London, with branches in the Australian Colonies. As their name indicates, their business mainly consists in lending money upon the security of real and personal estate situated in one or other of these Colonies. The appellant Walsh is the manager of their branch in Queensland; and, in that capacity, he is charged with the statutory duty of making an annual return, on behalf of the company, to the treasurer of the Colony, for the purposes of "The Dividend Duty Act of 1890" (54 Vict., No. 10).

The object of the statute is to impose a yearly duty, at the rate of 5 per centum, upon that proportion of the total dividends declared by the company during the year which has been earned by their business in the Colony of Queensland. With that view, sect. 8 provides that the company shall, on or before the 1st day of April in each year, forward to the Colonial Treasurer a return, in prescribed form, under the hand of and made by their manager, "shewing the total average amount of the assets of the company during the preceding calendar year, the average amount of such assets in Queensland during that year, the amount of all dividends declared by the company during that year, and the dates when they were respectively declared." The same section enacts that duty is to be charged upon so much of the total dividends declared during the year "as is proportionate to the average amount of the capital of the company employed in Queensland during the year as compared with the total average capital of the company during the year."

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(1) [1891] A. C. 476.

Sect. 9 enacts, that the proportion between the capital employed in Queensland and the total capital of the company "shall be deemed to be the same as the proportion between the value of the assets of the company in Queensland and the value of the total assets of the company wherever situate." For the purposes of the section it is declared that the term "assets" means "the gross amount of all the real and personal property of the company of every kind including things in action and without making any deduction in respect of any debts or liabilities of the company."

An information was laid against the appellant, as representing the company, by the Attorney-General for the colony, claiming a penalty of £500 under the provisions of sect. 20, upon the allegation that the return made for the year 1890 contained a false statement of the value of the average amount of the company's assets in Queensland during that year. The true value of these assets was alleged to be greatly in excess of £22,838 9*s.* 4*d.*, the sum at which they were estimated in the return.

In his defence the appellant affirmed the accuracy of the return, and also made some explanatory statements, upon which the present controversy depends. These are in substance that, in addition to the assets returned as situated in Queensland, the company had, during the year 1890, made advances outside that

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Colony, upon the security of real and personal property within it, to debtors, some of whom did, whilst others did not reside in the Colony; that, in many instances, the securities so given were collateral with securities over property of the debtor in other Colonies; that, in all cases, it was a condition of making the advance that the principal should be repaid, and also that interest as it accrued thereon from time to time should be paid, at the office by which the advance was made; and that their branch at Melbourne, in the Colony of Victoria, made the advances in question, and was in possession of the mortgages and other documents by which they were secured. The appellant alleged that, in these circumstances, the moneys advanced in Melbourne, if they were brought to Queensland, which he did not admit, were taken thither by the borrower, and were not capital of the company employed there by the company.

The Attorney-General demurred to the defence thus stated. The case was then heard before a full bench of the Supreme Court, consisting of Sir Charles Lilley, C.J., with Harding, Real, Cooper, and Chubb, JJ., who unanimously allowed the demurrer, and ordered judgment to be entered for the plaintiff with costs.

The only case presented by the appellant in the argument addressed to their Lordships was that these secured debts, viewed as assets of the company, are really situated either in London, the head-quarters of the company, or in Melbourne, where the transactions between them and the debtors took place, and where the latter are bound to pay, and not in Queensland. He maintained that, according to the condition in which these assets stood during the year 1890, the substance of each asset consisted in the personal obligation held by the company; that the legal situs of that obligation must determine the locality of the asset for the purposes of the Dividend Duty Act; and that the securities, being merely accessory to the personal obligation, can have no effect in regulating the nature or locality of the asset, until the creditor has, by virtue of them, entered into possession. It is obvious enough that, if the first of these propositions fails the whole argument falls to the ground.

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Their Lordships do not think it necessary to consider what the result would be if these assets were regarded as personal debts due to the company by individuals, some of whom resided in and others beyond the Colony. Though resting partly upon personal obligation the debts are all charged upon real and personal estate which the appellant himself alleges to be "in Queensland." Although the debt be not yet due and payable, so that the creditor has had no occasion to resort to his security, it is in vain to suggest that a debt covered by security is in the same position with one depending on personal obligation only. The market value of assets of that kind is, in most cases, so greatly enhanced by what the appellant represents as an immaterial and accessory right, that they are generally known and dealt in as securities. It is unnecessary to attempt a precise definition of the relation in which a mortgagee or other incumbrancer who has not taken possession stands to the subjects of his security. It is sufficient for the purposes of this case to say that he has, not merely a jus ad rem, but a present interest in and affecting these subjects, which is preferable to the interest of the mortgagor. Is such an interest in property admittedly situated in Queensland an asset in Queensland within the meaning of the Act? That is the sole question arising for decision in this appeal, and its merits lie within a very narrow compass.

The appellant's counsel did not dispute that the debtor's interest in the subjects which he assigned in security was an asset in Queensland; and they went so far as to admit that the creditor's interest would also be so, if he enforced his security by entering into possession. Independently of any concession in argument, neither of these propositions appears to be attended with doubt. Laying aside, as plainly untenable, the theory that, until he has attained possession, the creditor's right consists in the bare personal obligation of his debtor, it would be difficult to find any good reason for holding that it includes no interest in the subjects of the security which is capable of valuation. The personal obligation to pay may not be an asset in Queensland; but it does not follow that the debt due, so far as it is charged upon estate within the Colony, and gives the creditor a real and preferable interest in that estate, is not an asset in the Colony. Such an interest is certainly property of the company, and property in the Colony, because it affects the estate which is admittedly situated there. In that view, it is made an asset in the Colony, for the purposes of the Act, by the express provisions of sect. 9.

It may be right to notice that, the asset returnable being the charge upon Colonial property, and not the personal debt, the amount of the debt is not necessarily conclusive of its value. It is obvious that the value of the Queensland incumbrance may fall short of the amount of the debt; and also that, when the company hold collateral securities elsewhere, it may be proper to take these into account in valuing for the purposes of the Dividend Duty Act. These matters, however, are not hujus loci; because, this being a question in demurrer, the appeal must necessarily fail if any substantial part of the assets omitted ought to have been included in the return.

For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The appellant must bear the costs of this appeal.

Solicitors for appellant: *Flower, Nussey & Fellowes.*
Solicitors for respondent: *Freshfields & Williams.*

[PRIVY COUNCIL.]

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Feb. 3.

HENDERSON . . . . APPELLANT;

AND

ASTWOOD AND OTHERS . . . . RESPONDENTS.

ASTWOOD AND ANOTHER . . . . APPELLANTS;

AND

COBBOLD AND OTHERS . . . . RESPONDENTS.

COBBOLD AND ANOTHER . . . . APPELLANTS;

AND

ASTWOOD AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

Mortgagor and Mortgagee—Sale by Mortgagee after previous Sale to himself—Rights of Purchaser—Right of Mortgagee to Cost of Improvements.

A mortgagee, his power of sale on default having arisen, sold the mortgaged premises by public auction, ostensibly to a third person, in reality to himself; took possession as owner, and subsequently sold the same, with improvements effected by himself, in full proprietary right to the appellant.

In a suit for redemption against the mortgagee and the appellant, *held* that :—

(1.) The evidence failed to establish that the mortgagee's abortive sale to himself was fraudulent.

(2.) The sale to the appellant was a valid exercise of the power contained in the mortgage deed, and extinguished the right to redeem.

(3.) Though it was the duty of the mortgagee to account to the mortgagors until the power of sale was validly exercised and to offer so to do, it was not the duty of the appellant to give notice to the mortgagors to that effect, or to see to the application of the purchase-money.

(4.) The mortgagee should be allowed the cost of his improvements, so far as they had enhanced the value of the premises.

Shepard v. *Jones* (21 Ch. D. 469) approved.

APPEAL from a decree of the Supreme Court (Jan. 5, 1893), affirming a decree of the Chief Justice (Sept. 15, 1892), and adjudging certain deeds hereafter specified, of the 16th of September, 1887, and the 11th of August, 1890, to be fraudulent and voidable, as against the plaintiffs' rights as mortgagors of the property in suit, with consequential relief.

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* *Present* :—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, and SIR RICHARD COUCH.

The facts and proceedings are stated in the judgment of their Lordships. Here it need only be stated that the Astwoods were plaintiffs and mortgagors, Davies was the mortgagee, Cobbold the ostensible purchaser in 1887, Henderson the actual purchaser in 1890.

The Chief Justice held, on the 15th of September, 1892, with reference to the earlier deed, that no notice, direct or indirect, of the true nature of what ex facie was an absolute sale by auction was ever conveyed by the defendants to the plaintiffs, and that the plaintiffs were induced to believe that Cobbold was the bonâ fide purchaser of the wharf, and that all their equitable rights in the wharf were thereby extinguished, and that until the conveyance to Henderson they were not aware of the true nature of the sale in 1887. Further, he held that Henderson must be deemed to have purchased with constructive notice that, by means of a pretended transaction, the plaintiffs had been induced to believe that the wharf had been sold to Cobbold, and that their equity of redemption had thereby been extinguished. He accordingly declared the conveyance to Henderson fraudulent and void, and set it aside so far as it affected the plaintiffs' equity of redemption.

In appeal, a final decree was drawn up, with relief, as stated in their Lordships' judgment, which decree was founded on the following rulings by the judges, which were substantially in accord, and as follows:—

Nathan, J., declined to reopen the question whether the plaintiffs believed Cobbold to be a bonâ fide purchaser for value. He held that Henderson, "who bought at a good price," had notice that a fraud had been committed, and was being kept up, viz., the not accounting to the plaintiffs for the purchase-money paid by himself. He further held that Henderson was not a purchaser under the power of sale in the mortgage-deed at all, that power having been exhausted by the transaction with Cobbold, and that after the purchase in 1890 "there is nobody who in any sense can claim to be placed in the position of mortgagee." After the 11th of August, 1890, the mortgage debt must bear interest at 6 per cent. only. As regards improvements, the cost of them should be allowed to Davies if the plaintiffs "in the working out of the decree find themselves unable to redeem, and fall back as they are entitled to do" on the sale to Henderson, and thereby retrospectively ratify by election the expenditure by which the property was made worth the £7000 paid for it. But as regards disbursements by Henderson in permanent improvements, he held that Henderson was a purchaser, with notice of a defect in his title, and from the 16th of February, 1891, a party to this action expressly impugning it, and, therefore, had no right to recover such disbursements.

Northcote, J., agreed that by the transaction with Cobbold Davies had exhausted his power of sale. "A mortgagee cannot exercise his power of sale more than once without the concurrence of the mortgagor; therefore the second sale, that to Mr. Henderson, was not under the power of sale at all." He also agreed with respect to the above directions as to the accounts.

The Chief Justice also concurred, except that he doubted "whether, in the very special circumstances before us, the plaintiff can in equity claim to redeem the wharf without making allowance to the representatives of Dr. Davies for what he fully admits was money reasonably expended in productive improvements. Fortunately, however, as my learned brethren do not share my doubts, it is open to me to abstain from expressing any final opinion on this point."

Sir *R. Webster*, Q.C., and *Cowell*, for the appellant Henderson, contended that the sale to him by Davies was a valid exercise of the power contained in the mortgage deeds, and that the mortgagors were bound thereby. The evidence shewed that he bought at a full price, that the mortgagors had long been in default, and were wholly unable to cure that default by payment. There was neither allegation nor evidence that they could have done so; on the contrary, it was admitted that they could not.

There was nothing unfair in the transaction, and no conceivable motive on the part of Henderson for acting otherwise than fairly. It was said in the judgments that the power to sell was exhausted by the abortive transaction with Cobbold. Such a doctrine is new, and cannot be invoked against an innocent purchaser for value. As regards notice to the mortgagors that the sale to Cobbold was inoperative, Henderson was under no duty to communicate with them or to do more than ascertain that the power to sell had arisen. The sale to Cobbold could not extinguish or exhaust the power: see *Topham* v. *Duke of Portland* (1).

The Solicitor-General (Sir *John Rigby*), and *Christopher James*, for the respondents Cobbold and Mackinnon, the representatives of Davies, were not heard.

Cozens-Hardy, Q.C., and *G. Lawrence*, for the Astwoods, contended that, assuming under all the circumstances that the sale to Henderson was good, the principle on which Davies' estate was accountable to them must be ascertained. Davies remained in possession till the sale to Henderson, not merely in his character of mortgagee, but ostensibly as owner, having assumed the character of absolute proprietor by virtue of his abortive transaction with Cobbold. That was in fraud of the mortgagors, who were kept in ignorance of their equitable rights. Both Davies and Henderson failed in their duty to communicate with the mortgagors. Davies intended to avoid accounting, and Henderson through his solicitors connived at his so doing. Even if that view is extreme, still under the circumstances Davies had no implied authority from the mortgagors to expend any money in improvements of the mortgaged premises. Consequently the estate of Davies was not to be allowed the value of those improvements on taking the accounts. Reference was made to *Sandon* v. *Hooper* (2); *Shepard* v. *Jones* (3); Seton on Decrees, vol. 2, p. 1621.

The appellant was not heard in reply.

(1) Law Rep. 5 Ch. 40.

(2) 6 Beav. 246; S.C., 12 L. J. N. S. (Ch.) 309; and see also in appeal, 14 L. J. N. S. (Ch.) 120.

(3) 21 Ch. D. 469.

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LORD MACNAGHTEN:—

In 1887 one Davies, a Doctor of Medicine practising in Jamaica, was in the position of mortgagee in fee of a wharf at Kingston known as Astwood's Wharf. At an earlier period in the history of the property part of the site was occupied by Messrs. Finke & Co. The part which was then called Astwood's Wharf belonged to Miss Astwood, one of the plaintiffs. Her business manager was her nephew, George Astwood, the other plaintiff. Miss Astwood does not seem to have been a person of means, or to have taken an active part in the transactions which led to the present litigation. Everything was left in the hands of George Astwood. By an indenture dated the 22nd of June, 1877, Miss Astwood conveyed her property to Davies by way of mortgage, and charged it further in his favour by two deeds, dated respectively the 6th of October, 1880, and the 23rd of March, 1882. The mortgage contained a power of sale, absolute and unqualified, in the event of interest being in arrear for thirty days. In 1884 George Astwood bought out Messrs. Finke & Co. for the purpose of enlarging Astwood's Wharf. The purchase was made with moneys advanced by Davies, and the property was conveyed to him in fee upon certain terms defined in an agreement dated the 8th of March, 1884. The agreement provided for payment of interest on the purchase-money quarterly, and contained a power of sale without notice in case of default. By an indenture dated the 15th of September, 1884, the several charges on the premises which by that time had been thrown into one were consolidated; the interest in arrear was turned into principal, and a further advance was made by Davies for the purpose of improving the property, bringing up the total amount secured as principal to the sum of £4500. The powers of sale in the earlier deeds were kept alive, and made applicable to the new advance, and extended to all the mortgaged premises as if they formed one property in security.

In September, 1887, the interest on the consolidated mortgage was greatly in arrear, the business was falling off, the gross

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income was not sufficient to pay the charges and outgoings, and the Astwoods appeared to be hopelessly embarrassed.

In these circumstances Davies required payment of the amount due to him, which was stated to be £6000. The notice was disregarded, and he put the mortgaged premises up to auction. The auction was held on the 16th of September, 1887. The defendant Cobbold, who was son-in-law to Davies, was the highest bidder. The property was knocked down to him for the sum of £3200, which seems to have been its full value at the time.

Cobbold was ostensibly the purchaser. In reality he was acting on behalf of Davies. No money passed. Davies, however, executed a conveyance to Cobbold, and he at the same time signed a paper undertaking when called upon to convey the property to Davies.

After the auction Davies treated himself as the owner. He went into possession and repaired the property, made improvements, and carried on the business in his own name and on his own behalf.

On the 1st of May, 1890, Davies agreed to sell Astwood's Wharf for £7000 to the defendant Henderson, who was a member of a New York firm of steamship owners.

In carrying out the contract the flaw in Davies' title became apparent. In accordance with the practice in Jamaica the vendor's solicitor, a Mr. Vendryes, prepared the draft conveyance. Mr. Vendryes, who had been concerned in the earlier transactions, settled the draft as a conveyance to Henderson's firm from Cobbold. But in the fold of the draft he explained the state of the title in a note from which the following is an extract:—

"In 1887 Doctor Davies in the exercise of his powers as mortgagee sold the premises at public auction. All notices were given, and Mr. Cobbold being the highest and best bidder was declared the purchaser. He has not, however, paid the purchase-money. Indeed he purchased for Dr. Davies, who is now selling to the company. I have made the conveyance simply from Mr. Cobbold to the company as the most proper course to my mind, but should it be desired Dr. Davies will join."

Mr. Vendryes' suggestion was not adopted. On the purchaser's behalf, and without any objection on the part of the vendor, the draft was altered so as to state the whole transaction, and to put on record the fact that Davies was selling as mortgagee under the power of sale contained in his securities.

The conveyance to Henderson was dated the 11th of August, 1890. It was recorded in the Island Record Office on the 14th of that month.

George Astwood came to hear of the sale to Henderson before it was completed. He heard, too, that there was some hitch in the bargain. He thought, he says, "that the hitch must relate to the sale to Cobbold." His curiosity or his suspicion was aroused. As soon as Henderson's conveyance was recorded he made himself acquainted with its contents. Then it was, if his memory is to be trusted, that he "first discovered the real nature of the transaction." He did not, however, come forward at once. He knew that the wharf was wanted for the accommodation of a line of steamers. He probably thought it not unwise—perhaps he thought it not dishonest or unfair—to wait until Henderson had spent or had come under contract to spend a large sum on the property. Astwood himself puts Henderson's expenditure at about £8000. When Henderson was committed to a considerable outlay there was nothing more to be gained by waiting. So on the 16th of February, 1891, a writ was issued in the names of Miss Astwood and George Astwood against Davies, Cobbold, and Henderson. The writ was followed by a statement of claim filed on the 21st of March. The plaintiffs thereby claimed (1.) a declaration that Cobbold's conveyance and Henderson's were fraudulent and void as against the plaintiffs; (2.) an account of what if anything was due on Davies' securities; and (3.) redemption on payment of the balance, if any. There was an alternative claim asking (*a.*) an account of what was due from and to Davies treating him as mortgagee in possession from October, 1887, to August, 1890, and bringing into account the £7000 received by Davies from Henderson, and (*b.*) an order for payment against Henderson as well as against Davies of what might appear to be due from Davies.

Davies, who had gone to New York, died there on the 17th of

April, 1891, without having delivered a defence. The action was revived against his legal personal representatives, of whom Cobbold was one. They wrote to the plaintiffs' solicitors offering to submit to a decree for an account on the footing of Davies having been in possession as mortgagee from October, 1887, to August, 1890, bringing into account the £7000, with an inquiry as to permanent improvements made by Davies which increased the value of the mortgaged premises. This offer was rejected. It was repeated in the statement of defence delivered by Davies' representatives.

The action came on for trial before Sir Adam Gib Ellis, C.J., on the 21st and 22nd of July, 1892. On the 15th of September, 1892, his Honour pronounced judgment, in which he announced that the conclusion to which he had come on the whole case was:—

"That an order must be made (1.) Declaring that as against the plaintiffs the indenture of 16th September, 1887, and of 11th August, 1890, are fraudulent and void. . . (2.) Directing that an account be taken as between the plaintiffs and defendants the representatives of the late Dr. Davies as mortgagee in possession since 14th October, 1887. (3.) Finding the plaintiffs entitled to redeem the mortgaged premises on payment to these defendants of the balance found due on such accounting."

The precise terms of the decree were referred for settlement to the Full Court, to which both Henderson and Davies' representatives appealed.

The appeals, and the argument as to the settlement of the terms of the decree, came on to be heard on the 10th, 11th, and 28th of November, 1892, before the Full Court, consisting of Sir Adam Gib Ellis, C.J., and Nathan and Northcote, JJ. Judgment was given on the 5th of January, 1893. Both appeals were dismissed with costs, and Davies' representatives and Henderson were both ordered to pay the costs of the plaintiffs up to the date of the entry of the judgment. It was ordered and adjudged that the deeds of September, 1887, and August, 1890, were fraudulent and voidable against the plaintiffs' rights as mortgagors. An account was directed of what was due on

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the 11th of August, 1890, in respect of the mortgage, charging on the one hand an occupation rent and on the other interest at the rate specified in the mortgage. On the balance thus ascertained interest was to be calculated at the legal rate, but no allowance was to be made for moneys expended either by Davies or by Henderson on lasting improvements. Then provision was made for redemption of the premises on payment of the amount found due. Payment was to be made either to Davies' representatives and Henderson, in such proportions as they might agree, or into Court in the event of their not agreeing. In default of payment the action was to stand dismissed against Henderson, but apparently without costs. The plaintiffs, however, were to be allowed to fall back on their claim to have the £7000, the amount of the purchase-money paid by Henderson, brought into account, but in that case an inquiry was to be made as to moneys expended by Davies in lasting improvements.

With this decree all parties, including even the plaintiffs, are dissatisfied, and all parties have appealed to Her Majesty in Council.

In arriving at the decree under appeal the learned judges of the Full Court seem to have proceeded upon a view of the facts inconsistent, in their Lordships' opinion, with the fair result of the evidence.

The main ground of the decision is a finding of fact that Davies was guilty of actual fraud in going through the form of a sale to Cobbold. The so-called sale was of course inoperative. A man cannot contract with himself. A man cannot sell to himself, either in his own person or in the person of anohter. But such a transaction is not necessarily a fraud or evidence of fraud. The thing may be done with or without a dishonest intent. It may be a cloak for fraud, or it may be a mere blunder. The question is—which is the proper conclusion here? The facts really speak for themselves. Davies had advanced a large sum on a security not capable of yielding a return under all circumstances, but necessarily varying in value with the fluctuations of trade. Interest was in arrear to the amount of £800 or £900 according to George Astwood's own admission. For part of this sum acceptances had been given, and they were dishonoured. The outgoings, including interest, were £900 a year. The gross income could not be calculated at more than £800. So Astwood says in a letter written to Davies in June, 1887, in which he pleads for a reduction in the rate of interest. He was in debt, he says, to other persons besides Davies; trade was bad; he was not the only person in difficulties; on all sides were to be found empty and unoccupied wharves and stores that would neither rent nor sell for want of business; the only way to make the two ends meet was to reduce the interest. Davies replied that he was not averse to a reduction in the rate of interest, but that as things stood the expedient would be futile. Hampered as he was by debt and harassed by his creditors, Astwood could not attend properly to his business. So Davies counselled bankruptcy, promising help if Astwood were once in a position to make a fresh start. Astwood would not listen to this proposal. Davies told him there was nothing for it then but foreclosure, and advertised for a wharfinger to manage the business on his account. Thereupon, suddenly and without warning, Astwood closed the wharf, and carried the business off to other premises. His excuse is that he was afraid Davies would sell to himself privately, as he thought he had power to do. Then came the auction and the so-called sale to Cobbold. It was a foolish step. But what is there to suggest any dishonest intention? Davies might have entered and foreclosed. A foreclosure action must have been undefended. Astwood, as he says, had no money. Davies, if he pleased, might have asked for a sale and got leave to bid, or he might have called upon the Astwoods to release the equity of redemption. After the auction Astwood wrote to Davies a letter, in which he stated that he would have parted with his interests as they stood at the wharf, and agreed to connect himself no further with wharf business for a very trifling consideration. It is impossible to conceive any intelligible motive for fraud. Two of the learned judges do indeed suggest a motive. They suggest, with more or less confidence, that the object Davies had in view was to hold to the property if it turned out well, and to throw it back on the hands of the mortgagors if it turned out badly. And they found themselves to some extent on the fact that Cobbold's conveyance was not registered till the sale to Henderson. But neither of the learned judges explains what a mortgagee in his senses could hope to gain by throwing back an insufficient security on the hands of impecunious mortgagors. Their Lordships are satisfied that neither Davies nor the Astwoods considered the equity of redemption worth thinking about, and that on Davies' part there was neither fraud nor oppression.

Henderson's conduct is next brought under review. The charge in his case is, that through his solicitor he had notice of actual fraud. The notice is supposed to have been conveyed in the passage which has been already quoted from Mr. Vendryes' note on the draft conveyance to Henderson. Nathan, J., construes that passage as an invitation to connive at an attempt to conceal the nature of the previous transaction. "The purchaser," he adds, "had notice therefore that not only had a fraud been commenced, but that it was still being kept up, and he was asked to connive at it by taking under a title which at the same time he was informed was a sham one." On these grounds Nathan, J., bases his concurrence with the findings of the Chief Justice, that there was actual fraud, and that the purchaser had notice of it. But for the latter conclusion he adduces another reason to which he attaches "at least equal weight." It seems that when the draft conveyance was altered by Henderson's solicitor, apparently in New York, absolute covenants for title were inserted, and they passed without objection. Why the covenants for title took that form does not appear. Nothing seems to have been made of the point until the appeal. It may be the practice at New York, as was suggested before the Full Court. It may be that the form was adopted in consequence of a statement by Mr. Vendryes in his note on the draft conveyance that some of the documents connected with the title had been destroyed in the fire at Kingston; or it may be that the title was so well known that the form of the covenants was a matter of little moment, and it was not thought worth while to send the draft back to New York. However that may be, Nathan, J., expresses his opinion that Henderson's "recorded title to anyone acquainted with the practice of conveyancing reeks with fraud." Their Lordships are unable to discover such damning evidence in the covenants for title, nor do they take so uncharitable a view of the conduct of the parties. If Astwood thought Davies could sell to himself privately, it seems a little hard to call Davies a rogue because he thought he could buy from himself at a public auction. Mr. Vendryes may not have shewn much skill in his profession. But a solicitor may be a bad lawyer without being necessarily a bad man. And certainly Mr. Vendryes is entitled to this observation in his favour, that of his own accord, and without the pressure of any requisition, he told the whole story with perfect truth and frankness, as if he were not conscious of having done anything to be ashamed of. As regards Mr. Henderson himself the learned counsel for the Astwoods were invited to say what according to their view he ought to have done. Having learned a flaw in the vendor's title from a communication made to him by the vendor's solicitor, ought he to have disclosed it to the mortgagors? The Chief Justice seems to think he ought. But the learned counsel for the mortgagors promptly disavowed any notion of that sort. Still, they said he ought to have made some communication to Davies. But what should the communication have been? Insisting as Henderson did on a title under the power of sale, it would have been absurd for him to have required the concurrence of the mortgagors, or to have asked any question as to the proposed application of the purchase-money. What was there left to be said? Anybody in the position of Davies, whether honest or not, would have resented with indignation an allusion to a slip in the past or a pious wish for his good guidance in the future.

Although their Lordships acquit Davies of any dishonest intention in putting forward Cobbold as the purchaser, there is one part of his conduct which seems to call for observation. When he found that the sale to Cobbold was inoperative, and that he had not divested himself of the character of mortgagee, it became his duty to communicate the fact to the mortgagors, and to offer to furnish them with accounts; and this duty was specially incumbent upon him because he had himself in effect stated to them, as no doubt he believed at the time, that the sale at the auction in 1887 was a real transaction. It may be that he

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was satisfied that nothing in any event would be coming to the mortgagors. But the excuse, even if it were made out, would not, in their Lordships' opinion, relieve him from the duty plainly cast upon him. Their Lordships, therefore, think that his estate must bear the costs of the action up to the time when his representatives filed their defence.

As far as Henderson and his solicitor are concerned, they appear to have acted throughout with strict propriety; they had no reason to suspect that Davies had done or meant to do anything dishonest; and their Lordships much regret that the learned Chief Justice and his colleagues should have thought fit to use the term "fraud" in connection with their conduct.

At the trial the learned Chief Justice did not go so far as to hold that the power of sale had ceased to exist. But he held what was much the same thing, that it could only be exercised with the concurrence of the mortgagors. On appeal a fresh point was raised. It was contended that the power of sale was destroyed or exhausted by the ineffectual attempt to exercise it on the occasion of the auction in 1887. This contention was accepted without hesitation by all the learned judges. It seems to their Lordships that the proposition on which it is based is not founded on any principle; and the learned counsel for the Astwoods very properly admitted that, after the case of *Topham* v. *Duke of Portland* (1), it was impossible to maintain that a power was extinguished by an act done, apparently in execution of the power, but in reality in fraud of it. If the view of the Full Court were tenable, it would follow, of course, that the conveyance to Henderson could not have operated against the mortgagors. But how could it have operated in their favour? Davies was paid the fee simple value of the property. In return he purported to convey the fee simple and all his estate and interest in the premises. If he was not in a position to convey the absolute ownership, the conveyance must at the least have passed whatever interest he had. And yet the learned judges of the Full Court held that, after the conveyance to Henderson, there was "nobody who in any sense can claim to be placed in the position of mortgagee." The words quoted are Nathan, J.'s,

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(1) Law Rep. 5 Ch. 40.

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but the other judges use almost the same language. And so they all come to the conclusion that the effect of the conveyance was to release the mortgagors from their covenant to pay interest at the rate specified in the mortgage. Their Lordships are unable to follow this part of the decision.

If the sale to Henderson is valid, as their Lordships must hold it to be, the action is reduced to a mere question of account—an account of what was due in respect of the mortgage at the date of the sale and an account of the purchase-moneys. In taking the account it was not disputed that Davies was to be charged a fair occupation rent for the time when he was in possession, and that he ought to be allowed all moneys properly laid out by him in repairs. It was argued, however, that he was not entitled to any allowance for lasting improvements. And this was the principal topic in the argument on the plaintiffs' appeal. That Davies did make lasting improvements was admitted. It was not disputed that those improvements were necessary and proper, and that they added to the value of the premises. It would be contrary to common justice to deprive Davies of the benefit of the money laid out by him on those improvements, so far as they enhanced the value of the premises. Following the decision of Sir George Jessel, M.R., in the case of *Shepard* v. *Jones* (1) their Lordships think that an inquiry should be directed in general terms to ascertain what sum ought to be allowed in respect of lasting improvements. It was said that the improvements which Davies made could not have added to the value of the property from Henderson's point of view, having regard to the purpose for which he wanted it. That may be very true, but still Henderson may have had to pay a larger price for the premises because they were fitted with modern improvements, and suited to the ordinary requirements of the trade of the port.

In the result their Lordships think that an order ought to be made in the following terms:—

Dismiss the plaintiffs' appeal to the Privy Council with two sets of costs to be taxed.

Discharge the decree of the Full Court.

Order repayment of costs, if any, paid under it.

(1) 21 Ch. D. 469.

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Dismiss the action as against Henderson with costs to be taxed.

Order the plaintiffs to pay Henderson's taxed costs of his appeal to the Full Court and to the Privy Council.

Declare that Davies is to be charged with an occupation rent for the premises in respect of the period between the 16th of September, 1887, and the 11th of August, 1890.

Tax the costs of the plaintiffs of the action up to and including the date of the filing of the defence of the defendants Cobbold and Mackinnon except so far as such costs were increased in consequence of Henderson having been made a defendant.

Tax the subsequent costs of the defendants Cobbold and Mackinnon of the action, including their costs, if any, of the settlement of the terms of the decree, and of their appeal to the Full Court and to the Privy Council.

Deduct the costs of the plaintiffs as aforesaid from these costs and ascertain the residue of costs.

Take the following account and inquiry:—

1. An account of what was due to Davies under and by virtue of his mortgage securities on the 11th of August, 1890, and in taking such account Davies is to be allowed all sums of money laid out by him in necessary repairs on the mortgaged premises.

2. An inquiry whether any and what sum ought to be allowed to Davies in respect of lasting improvements.

And let such amount, if any, be allowed Davies in taking the account No. 1.

Let an annual value by way or occupation rent be set upon the mortgaged premises, and let the amount with which Davies is to be charged for such occupation rent be deducted from what shall appear to have been due under the account No. 1, and let the balance be certified.

And if such balance shall be less than the sum of £7000, let interest at the legal rate be computed on the amount of the difference from the said 11th of August, 1890.

Set off against the amount of such difference and interest the said residue of the said costs of the defendants Cobbold and Mackinnon, and let the balance be paid by the party from whom to the party to whom such balance shall be certified to be due.

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But if the balance of what shall appear to have been due on taking the account No. 1 after deducting such occupation rent be more than £7000, let the plaintiffs pay to the defendants Cobbold and Mackinnon the said residue of their costs.

Their Lordships will humbly advise Her Majesty accordingly.

Solicitors for Henderson: *Parker, Garrett, & Parker.*

Solicitors for the Astwoods: *Cookson, Wainwright, & Pennington.*

Solicitors for Cobbold and Mackinnon: *Druces & Atlee.*

[PRIVY COUNCIL.]

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1893
Nov. 30; *Dec.* 1.
1894
Feb. 10.

PARAPANO AND OTHERS . . . . DEFENDANTS;

AND

HAPPAZ AND OTHERS . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF CYPRUS.

Law of Cyprus—Hatti Humaïoun of 1856*—Law of* 11*th April*, 1884*—Law of Marriage—Legitimacy—Roman Catholic Ottoman subjects.*

Held, that by the law of Cyprus the legitimacy of a Roman Catholic Ottoman subject is to be ascertained by applying the canon law of the Roman Catholic Church.

Held, that by the canon law the infant appellants had been legitimated subsequent to their birth by the marriage of their parents authorized by papal dispensation.

Held, that by the Hatti Humaïoun of 1856 and the Cyprus Statute Law of 11th April, 1884, succession is regulated by creed, and accordingly the right to inherit in this case follows from the establishment of legitimacy.

APPEAL from a decree of the Supreme Court (April 30, 1892) reversing a decree of the district judge of Larnaca (March 21, 1891).

The suit was brought by the respondents claiming as joint heirs with the first appellant as the widow to recover two-thirds of the property of her deceased husband Peppo Happaz. They alleged that the remaining appellants his children were illegitimate. The rights of the parties depended upon the issue as to legitimacy.

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* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, and SIR RICHARD COUCH.

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The facts are stated in the judgment of their Lordships.

The District Court held that the children were legitimated under Mahomedan law, if that applied, by the recognition of them by their father; or if the canon law applied, by the subsequent marriage of their mother to the deceased.

The Supreme Court on the other hand held that under Mahomedan law the recognition relied upon did not conclusively establish legitimacy. It merely raised a presumption of a prior marriage which was rebutted by the evidence which admittedly proved that the children were born before the marriage. With regard to applying the canon law of the Church of Rome the Court considered that the marriage would be recognised as valid by a Mahomedan power, inasmuch as it was valid by canon law. But it held that the legal consequences of the marriage were not necessarily to be governed by canon law. There was no authority for saying that by the law of the island the marriage would operate retrospectively so as to legitimate the children born previous thereto.

Mayne, for the appellants, contended that the Supreme Court took an erroneous view of the Mahomedan law. As regards the doctrine that recognition of the children only raised a rebuttable presumption of a prior marriage, it would in most cases destroy the effect of recognition and render it useless. Recognition where it is allowable and has any effect at all constitutes by force of Mahomedan law legitimacy and is not merely evidence of it.

Further, the doctrine is erroneous that recognition is inapplicable in the case of children procreated by fornication. That is unlawful and prohibited. The offspring of concubinage may be legitimated by recognition. It is in fact to such cases that the doctrine of recognition applies, since no recognition is necessary where a marriage can be established.

But it was contended that inasmuch as this was a suit between Christians, relating to marriage and legitimacy, and to the rights of inheritance dependent thereon, it ought not to have been decided according to Mahomedan law at all, but by the canon law of the church to which the parties belonged. The

Court below regarded it as settled law that a marriage of any of its infidel subjects celebrated in accordance with the rites of their own church will be regarded as valid by a Mahomedan power. See on this point the preface to the Hedaya and to Baillie's Mahomedan Law. The Court, however, held that the legal consequences of the marriage are not necessarily to be governed by the law of the church. It was contended that if the Moslem law recognised the validity of the marriage in this case, it will also recognise its effect in giving legitimacy to the children of the married pair in such way as the canon law recognises it. Except where a Mahomedan was a party to a marriage or affected by it, the rule of the Mahomedan law appears to have been to treat a Christian marriage with all its results and incidents as something with which the law of the Koran had nothing to do. It at all events lay on those who asserted the contrary view to shew that the claim to legitimacy in this case was founded on a principle repugnant to the Mahomedan law. So far from that being the case, the Mahomedan doctrine of legitimacy by recognition involved the same principle of retrospective legitimacy as allowed by the canon law. It was also contended, that when the followers of Mahomet conquered countries which possessed a settled law, an established religion, and an organized priesthood, their policy had always been to leave the subject race in the full enjoyment of their own law and religion, except for purposes of government and revenue. This policy was fully recognised by the Ottoman Power in all its public Acts and legislation. If the parties were Mahomedan instead of Christian, their legitimacy was equally well established.

[Reference was made to Grady's Hamilton's Hedaya, p. xiv.; Baillie's Digest of the Sunni Law, pp. 142, 169, 179; Hertzlet's Map of Europe by Treaty, II. pp. 1002, 1243.]

The respondents did not appear.

The judgment of their Lordships was delivered by

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LORD HOBHOUSE:—

The contest in this case relates to the inheritance of one Peppo Happaz, who died on the 4th of June 1889. The defendants, now appellants, are his widow and children, who claim the whole estate. The plaintiffs, now respondents, who have not appeared in this appeal, are collateral relatives of Peppo. They admit that the widow is entitled to one-third of the estate, but claim the other two-thirds for themselves on the ground that the children are illegitimate. That claim is made under the rules of Mahomedan law. Peppo was, and his relatives are, Christians, and members of the Roman Catholic Church. The District Court dismissed the suit. The Supreme Court on appeal decreed the plaintiffs' claim, except that they gave partial effect to a gift made by Peppo to his children two days before his death.

In the year 1879, the widow Eudoxia, then a single woman, and with child by Peppo, went to live in his house, and she lived with him there till his death. While there she gave birth to the four infant defendants, the youngest of whom, Rosa, was born on the 6th of August, 1886. Afterwards Peppo wished to marry Eudoxia, with the double object of living in a more orderly manner, and of making his children legitimate. Eudoxia was a member of the Greek church, and a dispensation was necessary for Peppo to marry her. This was granted out of the Patriarchate Office in Larnaca on the 3rd of January, 1888; and on the same day Peppo was married to Eudoxia by his parish priest. The dispensation takes notice of his intention to legitimate the issue, and the marriage certificate states that a formal recognition of them then took place. When Peppo was on his deathbed, on the 26th of May, 1890, he made another formal recognition of his children in the presence of witnesses, and declared that they should be his heirs. Possibly this was done the better to satisfy the requirements of Mahomedan law, so that whichever law was found to apply to his case, his wishes might prevail. At all events, he did what he could to make his children legitimate.

The first step in the contest is to find out what is the law applicable to the case: the Christian or the Mahomedan. In the language of the Cyprus Courts of Justice Order, 1882, sect. 3, Ottoman law means the law which was in force in Cyprus on the 13th of July, 1878, and an Ottoman action means one in which the defendants are Ottoman subjects. By sect. 23, the Court in an Ottoman action is to apply Ottoman law as from time to time altered and modified by Cyprus Statute Law. The only statute law bearing upon this point is that of the 11th of April, 1884: "To amend the Law relating to Inheritance and Succession." By sect. 16 of that law it is provided that the property of the deceased shall devolve on all his legitimate children. That seems to narrow the contest down to the one point of legitimacy. If legitimacy is proved, the right to succession follows. By what law, then, is the legitimacy of a Christian Ottoman subject in Cyprus to be ascertained? By Christian law, or by Mahomedan law?

The Courts below have both applied Mahomedan law to the case, though they have differed in their views of that law. Their Lordships will now assign their reasons for thinking that the Christian law applies. And they will first consider how the question would stand independently of the Hatti Humaïoun of 1856.

When the Turks conquered Cyprus, that island had been for nearly four centuries in the hands of adherents of the Latin Church. The conquerors did not enforce all Mahomedan usages on their Christian subjects, but they allowed non-Mussulman sects to be governed by their own laws in divers matters connected with religion and domestic life. Among such matters are marriage, divorce, alimony, and dower. Now, if the status of husband and wife among Christians is determined by reference to Christian law, it is not difficult to suppose that the status of their children as regards legitimacy may be determined by the same law. It is a matter of well-known history that the Catholic priesthood claimed to treat the sacrament of marriage and its incidents as matters appertaining to religion and as subject to ecclesiastical jurisdiction, and that these claims were the subject of much controversy in England, where the lay powers rejected the canonical doctrine of legitimation by subsequent marriage. The Christian view of this question in Cyprus can hardly be doubted, though of course the Turkish view might be different.

Upon this point the learned judges below say "We feel that it is extremely improbable that the Ottoman Government should have consented to confer on its Christian subjects any larger privileges with regard to the legitimising of children than belong to its Moslem subjects." Their Lordships cannot follow this remark.

In the first place the privileges claimed for Christians are not larger. They happen to take in the case which the learned judges are discussing, and which they hold that the Mahomedan law would exclude, viz., the case of a child born in *zina*. On the other hand, the Christian law will not allow of any legitimation except by marriage of the parents, whereas the Mahomedan law gives the father much greater liberty of action. It is difficult to predicate of either law that it gives larger privileges than the other. They are quite different.

In the second place, if any inference may be drawn from the policy of one set of Mahomedan conquerors to that of another, the policy of the conquerors of India is at variance with what the learned judges think to be probable. During the period of their rule, as at the present time, there has been such wide liberty for each religious community to follow its own laws in private affairs, that it may almost be said that territorial law has not existed there except for matters of Supreme Government, such as the collection of revenue, the maintenance of order, the administration of justice between persons of different sects, and so forth.

Their Lordships have been referred to a passage from Hamilton's Introduction to the Hedaya, in which this policy is stated:—

" Many centuries have elapsed since the *Mussulman* conquerors of India established in it, together with their religion and general maxims of government, the practice of their courts of justice. From that period the Mussulman Code has been the standard of judicial determination throughout those countries of India which were subjugated by the *Mohammedan* princes, and have since remained under their dominion. In one particular indeed, the conduct of the conquerors materially differed from what has been generally considered in Europe (how unjustly will appear from many passages in this work), as an invariable principle of all *Mussulman* governments; namely, a rigid and

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undeviating adherence to their own law, not only with respect to themselves, but also with respect to all who were subject to their dominion. In all spiritual matters, those who submitted were allowed to follow the dictates of their own faith, and were even protected in points of which, with respect to a *Mussulman*, the Law would take no cognizance. In other particulars indeed of a temporal nature they were considered as having bound themselves to pay obedience to the ordinances of the Law, and were of course constrained to submit to its decrees. Hence the Hindus enjoyed under the *Mussulman* government a complete indulgence with regard to the rites and ceremonies of their religion, as well as with respect to the various privileges and immunities, personal and collateral, involved in that singular compound of allegory and superstition. In matters of property, on the contrary, and in all other temporal concerns (but more especially in the criminal jurisdiction), the *Mussulman* law gave the rule of decision, excepting where both parties were Hindus, in which case the point was referred to the judgment of the *Pundits* or Hindoo lawyers."

Of course this is not any exact statement of the law, but it serves to shew that there is nothing improbable in supposing that when Mahomedans conquered territories inhabited by people of another creed supported by strong religious organizations, they smoothed their way by leaving important local and personal usages to a great extent undisturbed. Such was certainly the policy of Mahomet II. in the 15th century, and probably Selim II. acted on the same principles in the 16th. What are the precise usages so left undisturbed, is matter for inquiry in each country.

The solemn edict of the 3rd of November, 1839, which is referred to in subsequent discussions as a sort of Turkish *Magna Charta*, usually under the name of the Act of Gul-Hané, is not at all specific on this point. It is rather concerned with asserting the equality of Ottoman subjects in various matters, and the authority of Courts of law. But during the disturbance caused by the Crimean war, the Christian powers put pressure on the Sublime Porte to give greater security to its Christian subjects; and this action, after long discussion, resulted in the Hatti Humaïoun of the 18th of February, 1856. Before stating the special provisions of that law, it is of some importance to see what was the opinion of Ottoman authorities as to the then existing position of the Christians.

On the 13th of May, 1855, Aali Pasha, the Grand Vizier, wrote a memorandum which was circulated to the several Powers concerned, and which contains the following passages:—

"C'est librement au moment même de la conquête dans la plénitude de la plus entière autorité que les Sultans, fidèles au sentiment de l'humanité et à l'esprit même de l'Islamisme, ont accordé aux Chrétiens de l'Empire Ottoman leurs premiers priviléges. . . .

"Les Patriarchats . . . . réunissent un tel faisceau de droits civils et religieux que l'on peut vraiment dire qu'à la réserve de l'autorité politique, que le Gouvernement Musulman exerce seul, les Chrétiens sont plutôt administrés, jugés, et dirigés par une autorité Chrétienne que Musulmane. C'est volontairement sans y être amenés par aucune considération que celle de leurs devoirs de Souverains, que les Sultans ont établi un tel état de choses, qui n'a jamais été sérieusement compromis."

Such passages in a despatch must not be taken as exact statements of law. But their Lordships may be sure that in so critical a discussion the Grand Vizier would be well advised, and that his despatch represents that which statesmen, and probably lawyers, considered to be the true position of Christian subjects. It speaks of the privileges of Christians as being in accordance with the very spirit of Islam, and goes on to say that they are civil rights as well as religious, and to describe them in terms not very different from those which their Lordships have just been using with reference to India.

In this state of affairs the Hatti Humaïoun of 1856 was promulgated. The original is in French, a copy of which was handed by Fuad Pasha to Lord Stratford de Redcliffe, and was laid before the Houses of Parliament with an official English translation. Their Lordships remark this, because the version given in the book of Aristarchi Bey, entitled Législation Ottomane, is incorrect. They quote from the official English translation furnished to them from the Foreign Office.

The document refers to the Act of Gul-Hané, and confirms and consolidates the guarantees there given. It also confirms and maintains all privileges and immunities granted by the Sultan's ancestors ab antiquo and at subsequent dates to Christians and non-Mussulmans, and declares that the powers conceded to the Christian patriarchs and bishops by Mahomet II. and his successors shall be made to harmonize with the new position of affairs. Then follow a number of provisions for the purpose of carrying these intentions into effect. The passages which bear specially on the point now under consideration are as follows:—

"All commercial, correctional, and criminal suits between Mussulmans and Christian or other non-Mussulman subjects, or between Christian or other non-Mussulmans of different sects, shall be referred to mixed tribunals . . . .

"Suits relating to civil affairs shall continue to be publicly tried, according to the laws and regulations, before the mixed provincial councils, in the presence of the governor and judge of the place. Special civil proceedings, such as those relating to successions or others of that kind, between subjects of the same Christian or other non-Mussulman faith, may, at the request of the parties, be sent before the councils of the patriarchs or of the communities."

This seems to their Lordships to do away with such doubts as may have previously existed. It is said by the learned judges below that the Hatti Humaïoun does not apply, because the patriarch is only to be called in at the request of the parties. But that remark hardly meets the force of the argument. The question to be decided is one relating to the history of the Turkish conquest of Cyprus, and to the policy adopted by the conquerors. What disputes arising between Christians did the Turks permit to be governed by Christian law? The Hatti Humaïoun does not profess to give any larger privileges in this respect than had been given ab antiquo. The important purpose it performs is to provide machinery for giving practical effect to those privileges. One of its provisions is the introduction of the ecclesiastical superior of the parties in certain processes. That is to take place at the request of the parties. But it is not implied that the law applicable to those processes is changed by the Hatti Humaïoun itself, or that it can be changed at the will of the parties. It seems to their Lordships the just inference that the chief of a Christian community is a permissible judge, because the process to be decided is one of Christian law with which he is conversant. And questions of succession are selected as an illustration of such processes.

If this conclusion requires strengthening, corroboration is to be found in ministerial and legal acts subsequent to the Hatti Humaïoun.

On the 15th of May, 1867, Fuad Pasha, the Turkish Minister for Foreign Affairs, addressed a minute on the subject of the Hatti Humaïoun to the representatives of the Sublime Porte at London, Paris, Vienna, Berlin, St. Petersburg, and Florence. A copy will be found in the Législation Ottomane, vol. ii. p. 24. It is written in French, of which their Lordships will attempt a translation. It commences by referring to the Hatti Humaïoun as the confirmation and the development of the Act of Gul-Hané. Then follows a very full and exhaustive statement of the motives and effect of the Hatti Humaïoun, in which there occur the following passages:—

"The privileges and immunities granted ab antiquo to non-Mussulman communities have ever been respected, and no complaint has arisen to mark any encroachment on the spiritual rights of the chiefs of those communities. The Imperial Government has done more. Whenever the councils of these communities have manifested a wish in the sense of an extension of their prerogatives, it has met them generously, and has favoured the adoption of such measures and regulations as are best calculated to place their spiritual jurisdiction in harmony with new manners, institutions and needs . . . .

"As for suits which depend upon religious laws, and which by their nature can only interest Mussulmans among themselves or Christians among themselves, such suits shall be brought before the jurisdiction of the sheriff for Mussulmans, and before the ecclesiastical jurisdiction of the community for Christians; which special tribunals are governed by their own peculiar laws and regulations."

From those passages their Lordships infer, first, that the

Ottoman Government expected the Hatti Humaïoun to be construed, where doubtful, in a sense favourable to the privileges of non-Mussulmans; and, secondly, that when the chief of a religious community had jurisdiction it was assumed he would administer the law of his own community.

Again, in the law of 1884 before referred to, sect. 8 runs as follows: "If after inheriting any property the heir changes his religious creed, the property so inherited shall devolve upon his heir at his death in accordance with the law regulating the inheritance of persons professing the creed professed by him at the time of his death." That section proceeds upon facts which are not the facts of the present case, but it involves the principle that succession is regulated by creed. The law does not apply to the property of deceased Mahomedans.

The conclusion is that the succession in this case is governed by the canon law, under which the infant defendants are clearly legitimate. Taking this view, their Lordships are relieved from considering a question which has given some trouble in England, viz., the question whether the right to inherit follows from the establishment of legitimacy, because the right to inherit is clearly dealt with by the Hatti Humaïoun and the Law of 1884. They are also relieved from considering any question of Mahomedan law, or the effect to be given to the deed of gift. In their opinion the Supreme Court should have dismissed the appeal, and they will now humbly advise Her Majesty to make a decree to that effect. They do not think it right to disturb the directions of the Courts below as to costs, but they are of opinion that the respondents should pay the costs of this appeal.

Solicitors for the appellants: *Busk & Co.*

[PRIVY COUNCIL.]

J. C.*
1894
Jan. 30;
March 10.

WEST AUSTRALIAN LAND COMPANY, LIMITED . . . . PLAINTIFF;

AND

FORREST, COMMISSIONER OF CROWN LANDS . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Construction—Contract—Right to select Waste Lands.

Where by contract between the appellant and the local government the former was entitled, in part consideration of constructing a railway, to select subsidy and compensation blocks of land within a prescribed area, and to call for grants thereof in fee simple in the form prescribed by the Land Regulations of the colony, and the latter was bound to abstain from making any grants or sales of land within such area to third parties during the currency of the contract:—

Held, reversing the decision of the Court below, that by the true construction of the contract the appellant was entitled to select from all lands within such area which the Government was at the date of contract able to convey in fee simple, including such lands as had been previously proclaimed as town sites, but which had not by virtue of such proclamation been devoted to public uses or otherwise withdrawn from the Government's power of alienation.

APPEAL from a decree of the Supreme Court (May 21, 1891), affirming a decree of the acting chief justice (Nov. 17, 1890), upon a special case.

The question for decision in this appeal was whether Crown lands situated in certain proclaimed town sites were by the true construction of a contract, regard being had to the effect of the proclamation, exempt from a right of selection conceded by the contract to the appellant over areas which included such town sites.

Finlay, Q.C., and *Bremner*, for the appellant.

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* *Present*:—LORD WATSON, LORD ASHBOURNE, LORD MACNAGHTEN, LORD MORRIS, LORD BOWEN, and SIR RICHARD COUCH.

The Solicitor-General (Sir *John Rigby*) and *J. G. Wood*, for the respondent.

1894. March 10. The judgment of their Lordships was delivered by

Lord Watson:—

The decision of this appeal depends upon the meaning to be attributed to the word "land," as it occurs in certain articles of a contract which was concluded, on the 25th of October, 1884, between the Governor of Western Australia and one Anthony Hordern, therein styled "the contractor," who has assigned all his rights and liabilities under it to the appellant company. The contract, and its assignment to the company, were confirmed by an Act of the Legislative Council of the colony, which received the Royal Assent on the 19th of April, 1888. In order to appreciate the merits of the present controversy, it is necessary to refer, in some detail, to the terms of the contract, and also to the regulations which at its date were applicable to colonial lands belonging to the Crown.

The purposes of the contract were, in the first place, to establish railway communication between Albany, a seaport town situated upon King George's Sound, and Beverley, an inland town, upwards of 200 miles to the north, from which the Government was in course of constructing a line of railway to Freemantle, on the western coast; and, in the second place, to increase the European population of the colony.

The contractor undertook to construct the railway, to provide suitable plant, and to work it for traffic; and the undertaking, when duly completed, was to become his absolute property. The land required for the construction of the line, so far as belonging to the Government, was to be given free of charge; and, in so far as it was private property, the contractor was empowered to acquire it compulsorily, upon payment of compensation to the owner. For the purposes of the contract, the line was divided into sections which were to be completed successively.

On the other hand, the Government, by article 49, became bound "to grant in fee simple to the contractor, by Crown grants in the form prescribed by the Land Regulations of the colony, a subsidy in land, for and in respect of each section or deviated section as herein-before defined, at the rate of 12,000 acres for every mile of the railway which shall be duly completed and open for traffic, in accordance with the provisions of these presents, and a proportionate quantity for and in respect of such length of line less than twenty miles which shall be over from the end of the last of such sections to the actual completion of the line."

Article 50 provides that the lands so to be granted to the contractor as a subsidy shall be selected by him within twelve months from the opening of each section subject to conditions which it prescribes. The conditions which are of importance in the present case are: (1) that the quantity of land to be granted in respect of each section shall be selected within a reserved area bounded on two sides by lines drawn on each side of and parallel to the railway at a distance not exceeding forty miles therefrom, and on the north and south by lines produced east and west through the termini of the sections which have been duly completed and opened for traffic, but not in advance thereof; (2) that each quantity shall be selected in blocks of not less than 12,000 acres, and that such blocks, except when bounded by the lands taken by the railway, shall have their boundaries at right angles to the meridian; (3) that half the frontage to the railway along each section shall be reserved to the Government; and that the blocks so reserved shall have a frontage of not less than five miles in the direction of the meridian and a depth of not less than fifteen miles. The same article prescribes that the contractor shall, at his own expense, make all such "surveys, plans, and diagrams" as the Surveyor-General of the colony may "consider necessary . . . for ascertaining and defining the boundaries of the land to be granted, and for all other purposes required by the provisions of this agreement." These surveys are to be kept by the surveyor as official records; and the surveyor is to be satisfied that all necessary reservations for roads and other public purposes have been sufficiently provided for.

Upon the completion of each section the contractor (article 52) is entitled to deeds of grant of a moiety of the land selected by him; and (article 53) on the completion of the undertaking to grants of the remaining moiety. He has also, by article 57, "the privilege of declaring town sites and villages within the areas aforesaid upon the lands selected by him as aforesaid."

By article 51 it is stipulated that, when the contractor takes land within a town site from a private owner, for the purpose of constructing the line, he shall be entitled to select lands at the rate of one acre for every 10*s.* of the compensation paid by him. The selection is to be confined to the area from which he has a right to select lands as a subsidy for the line, and in blocks of not less than 5000 acres, unless a smaller quantity of land will cover the compensation, in which case the land must be taken in one block.

By article 45, the contractor became bound, within seven years from the date of the contract, to introduce into the colony, at the rate of not more than 1000, and not less than 700 in each year, 5000 adults of European extraction. For each of these immigrants the Government, by articles 46 and 47, agreed to pay the contractor £10, or in his option to grant to him in fee fifty acres of land, to be selected by him, in blocks of not less than 10,000 acres, "out of the residue of the lands within the areas hereinafter defined in clause 50 remaining after selection of lands to be granted to the contractor as a subsidy for railway construction, maintenance and equipment."

It was also agreed, by article 55, that the Government should not, during the time limited for the construction and opening of the railway, make any grants or sales of land within the reserved area from which the contractor's subsidy and other lands to which he was entitled under the contract were to be selected.

The Land Regulations of Western Australia, proclaimed in October, 1882, were in force at the date of the contract. They apply to all "Crown lands," which are defined, in clause 2, as "the waste lands of the Crown within the colony," whilst "Crown grant" is defined as "a deed of grant issued in name of Her Majesty, conveying to the grantee some portion of Crown lands in fee simple." Clause 3 confers upon the governor for the time being full authority to dispose of the Crown lands in the manner and upon the conditions prescribed by the regulations. By clause 38, these lands are, for administrative purposes, divided into "town," "suburban," and "rural," the latter class including mineral and pastoral lands; and the governor is empowered from time to time to classify any Crown lands, and to vary the classification as he may deem advisable. There is a group of clauses (39 et seq.) which deal with the alienation of Crown lands in fee simple. It is unnecessary to refer to their provisions, beyond noticing that, whilst rural lands are open for private sale in fee simple, at prices not less than the minimum fixed by the regulations, town and suburban lands must, in the first instance, be exposed to public auction, when, if not sold, they may be "open for purchase by selection by any person at the upset price."

Clause 29 confers very wide powers upon the Governor, either to reserve to Her Majesty, or to dispose of in any other manner as for the public interest may seem best, such lands as may be required for the public objects therein specified. It is not necessary to recapitulate these objects, one of which is "resting places and commonage for horses, cattle, and sheep."

Before the date of the contract, the Governor had, in terms of the regulations, duly proclaimed certain areas within the reserved area, as defined by article 50 of the contract, to be town sites and commonages. He had placed one of these town sites under the jurisdiction of the Municipal Council of Albany; and had also placed the commonages so declared under the control of boards of management. The present controversy arose from the Government having refused to allow the appellant company to include any portion of these town sites or commonages in the lands selected by them under the contract, and having, after the date of the contract, sold and made grants in fee simple of lands within such town sites.

In order to obtain a settlement of these differences the company presented a petition of right to Sir Malcolm Fraser, at that time administrator of the government of the colony, who, with the advice of his executive council, referred it to the Supreme Court for trial, and appointed the respondent in this appeal to be the nominal defendant on behalf of the Government. The parties then adjusted a special case, in which these two questions were submitted for the opinion of the Court:—

"(1.) Did or does the company's right of selection in respect of the said subsidy, and in respect of compensation paid by the company under clause 51 of the contract, or in respect of either of the same, extend over all rural Crown lands, including commonages as aforesaid, within the reserved area?

"(2.) Did or does the company's right of selection, as aforesaid, extend over all Crown lands within town sites within the reserved area?"

The parties also agreed upon the terms of the judgment to be pronounced by the Court in the alternative events of one or other or both of these queries being affirmed, or of both being answered in the negative.

The case was heard before the Acting Chief Justice of the Supreme Court, sitting as a primary judge, who found upon both questions for the respondent, and directed judgment to be entered for him with costs. On appeal his decision was affirmed by a full bench, consisting of the Acting Chief Justice and his Honour, E. A. Storey, the Puisne Judge. In this appeal, the company have not sought to impeach the finding of the Courts below upon the first question submitted, which proceeded upon the ground that areas of rural land, formally proclaimed as commonages, are thereby dedicated to the uses of the public, and, so long as such dedication is in force, are not, although the fee simple may remain with the Crown, lands which can be disposed of to a purchaser under the regulations.

The second question, with which alone this Board has to deal, relates exclusively to lots of land belonging to the Crown, within areas previously proclaimed by the Governor to be town sites, which, at the date of the contract, had not been sold by the Government, and were neither subject to any right of preemption, nor dedicated to the uses of the public. It appears to their Lordships that these lots, which the Government could have exposed to public sale, and, after unsuccessful exposure, could have sold by private bargain to the first person who was willing to pay the upset price, stand in a very different position from Crown lands declared to be commonages, in which members of the public had, and would continue to have a vested interest, until revocation by the Governor.

The articles of the contract which confer the right to select subsidy and compensation blocks from the reserved area, and from time to time to call for grants thereof in fee simple, impose no limitation upon the lands which the company are at liberty to select, beyond what is implied in the expression "Crown Grants in the form prescribed by the Land Regulations of the colony"—a limitation which is accentuated by the obligation laid upon the Government to abstain from making any grants or sales of land within the reserved area during the currency of the contract. The plain effect of these provisions is, to confine the obligations of the Government, and the corresponding rights of the company, to lands belonging to the Crown, which the Government was then in a position to convey in fee simple, or, in other words, to Crown lands, whether "town," "rural," or "suburban," which were not affected by any contract of sale or pre-emptive right, and were not devoted to public uses.

Both Courts below have practically held that all Crown lands within town sites are outside the scope of the contract. Their Lordships have been unable to find anything to justify that conclusion, either in the contract itself, or in the Land Regulations "Town" lands, which the Government is in a position to sell by auction, are, just as much as "rural" lands, which it can sell by private bargain, "waste lands of the Crown," within the meaning of the regulations. The main if not the only reason for separately classifying town and rural Crown lands is to be found in the fact that different methods are prescribed for their disposal to settlers in the colony. In both cases, the Governor has the same absolute power of alienating the lands from the Crown and vesting them in a subject. The acting Chief Justice seems to have attributed a much wider effect to the proclamation of a "town site." He says, in his second judgment: "In a colony like that of Western Australia, it (i.e., a Crown site) means land taken up, used, or dedicated to a public purpose, that purpose being the building of a town." If Crown lands within a town site were really dedicated to a public purpose, they would undoubtedly be beyond the scope of the contract; but the lands in question are not "dedicated" in any other sense than this, that they are destined to be sold by auction, and to be acquired by individuals and used by them, not for public but for private purposes; and that does not constitute dedication to a public purpose, either according to the legal or the conventional meaning of the words.

The learned judges attached considerable weight to the obligation to make surveys incumbent on the company, as indicating that it was not intended that they should be entitled to select from the reserved area any land which had been previously surveyed by the Government. But the obligation is not absolute: the company are only bound to make such surveys "as the said surveyor-general may consider necessary." Their Lordships do not think that any inference can be safely derived from an obligation expressed in these terms, for the purpose of imposing a limitation upon articles of the contract which are in themselves abundantly clear.

The puisne judge lays much stress upon the fact that town lands are "surveyed and worked out into small blocks of from half an acre to three acres more or less, and that the boundaries of such blocks do not always run in the direction of land at right angles to the meridian. He then goes on to argue that, Had it been intended that the contractor should be empowered to select such small blocks as from half an acre to three or four acres, there would be no sense in the provision which requires him to select in such large blocks as 12,000 acres." Their Lordships cannot find that any pretension to a right to select blocks of land from half an acre to three or four acres in extent has ever been put forward by the appellant company. The only question raised by the special case is, whether the contract gives them the right to include town lands at the disposal of the Government, in the large blocks selected by them in accordance with the provisions of article 50. The boundaries specified in that article only apply to the exterior of these blocks, and do not prescribe the manner in which their contents are to be laid out. The contract does not appear to their Lordships to require that the blocks selected by the company shall not comprehend, within their external boundaries, any lands the fee simple of which had been disposed of before its date. Its terms are sufficiently complied with, if these boundaries include at least the minimum acreage prescribed of lands open to the company's selection.

Their Lordships are also of opinion that the primâ facie and obvious meaning of the word "land" as it is used in preceding articles cannot be legitimately altered or controlled by the circumstance that article 51 empowers the company to select land at the rate of one acre for each ten shillings of compensation paid to the owners of town land taken for railway purposes. They have only to add that, having regard to the obligation, which the contractor undertook, to add to the population of the colony, there seem to be no good grounds for inferring that he or his assigns were to be debarred from giving grants of land to emigrants within areas already designated by the Government as suitable for a town or village settler. The selection of such lands by the company cannot have the effect of exempting them from the municipal control to which they had been duly subjected by the Government. Even in the case of new town and village sites which the contract gives them the right to declare, the company have no power to create municipal administration.

Their Lordships will accordingly humbly advise Her Majesty to affirm the judgments appealed from in so far as they relate to the first question submitted by the special case; quoad ultra to reverse the judgments appealed from, and to affirm the second question submitted by the special case; and, in accordance with the arrangement made by the parties themselves in that event, to direct that a verdict be entered for the appellant company for forty shillings damages, with costs on the higher scale in both Courts below, and also that there shall be an inquiry before the Master of the Court as to what lands within the reserved area have been sold by the Government, contrary to the terms of the contract, since the date of the contract, and what purchase-moneys or other moneys have been received by the Government therefor; and that judgment with costs shall be entered for whatever amount shall be certified by the Master on such inquiry. The respondent must pay the appellant company their costs of this appeal.

Solicitors for the appellant: *Ashurst, Morris, Crisp, & Co.*
Solicitors for the respondent: *Sutton, Ommaney, & Bendall.*

[PRIVY COUNCIL.]

J. C.*

1894

Jan. 19; Feb. 3.

UNION STEAMSHIP COMPANY, LIMITED DEFENDANT;

AND

CLARIDGE . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Negligence—Master and Servant—Common Employment.

Where a contract under which a ship was discharged of its cargo did not provide that the whole work was to be done by the stevedores, but reserved to the shipowners the employment and control of those members of their crew who worked the tackle of the ship used in such discharge:—

Held, that the shipowners were liable to a servant of the stevedores for injuries occasioned to him by the negligence of a winchman, one of the crew. The winchman was not in the employ of the stevedores, nor subject to their orders and control.

APPEAL from an order of the Court of Appeal (Nov. 16, 1892), reversing a judgment of Denniston, J. (July 27, 1892).

The action was to recover damages for injuries received by the respondent while assisting to discharge a cargo of coal from the steamship *Orowaiti*, a vessel belonging to the appellant, in consequence, as he alleged, of the negligence of the appellant's servants.

The question decided was whether the defence of common employment was open to the appellant. The respondent, a dock labourer, was employed by the stevedores, who were under contract with the appellant. The winch-driver and watchman, whose negligence, or that of one of them, caused the respondent's injuries, were servants of the appellant company, but alleged by it to be for the purposes of its contract with the stevedores in the actual employment of the latter.

Denniston, J., held that those two persons were at the date of the injuries complained of in the employment and under the control of the stevedores. The Appeal Court held that they were in those of the appellant company.

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* *Present*:—LORD WATSON, LORD HALSBURY, LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, and LORD JUSTICE DAVEY.

Lawson Walton, Q.C., and *Brook Little*, for the appellant, contended that the Association of Stevedores undertook, by virtue of the contract with the appellant company, the whole operation and management of discharging the cargo. The actual duty undertaken by the association was performed by its foreman, who had actual control over all persons engaged in the actual work of discharge. The winch-driver and watchman were employed at the option of the stevedores, who also had the option to withdraw them from their employment and substitute others, either of their own servants or of the ship's crew. While the ship's crew were so engaged they were withdrawn from the control of the appellant and were under the control of the stevedores. They were paid by the stevedores, since the appellants were allowed in account with the stevedores the amount of their wages. The proper inference from the evidence was that the negligence complained of was the negligence of those under common employment with the respondent.

[Reference was made to *Quarman* v. *Burnett* (1); *Rourke* v. *White Moss Colliery Company* (2), where the wording of the contract was very similar; *Murray* v. *Currie* (3); *Manning* v. *Adams Brothers* (4); *Murphey* v. *Caralli* (5); *Donovan* v. *Laing* (6); *Johnson* v. *Lindsay* (7); *Moore* v. *Palmer* (8).]

Finlay, Q.C., and *Corner*, for the respondent, were not heard.

1894
Feb. 3.

The judgment of their Lordships was delivered by

LORD WATSON:—

The appellant company are owners of the steamship *Orowaiti* which arrived at Lyttleton Harbour, in August 1891, with a cargo of coal. They contracted with the Canterbury Stevedoring Association, Limited, for the discharge of the cargo into a hulk; and, in the course of that operation, the respondent, whilst working as a lumper in the employment of the association, was severely injured by the fall of a basket of coal. He thereupon

(1) 6 M. & W. 499.
(2) 2 C. P. D. 205.
(3) Law Rep. 6 C. P. 24.
(4) 32 W. R. 430.
(5) 3 H. & C. 462.
(6) [1893] 1 Q. B. 629.
(7) [1891] A. C. 371.
(8) 2 Times L. R. 781.

instituted this suit for damages against the company, upon the allegation that his injuries were occasioned by the negligence of one or more of the crew of the *Orowaiti.*

The case went to trial before Denniston, J., and a special jury of twelve. It appears from the evidence then led, that the *Orowaiti* had four hatches, at all of which the process of unloading was carried on simultaneously, and in the same way. There were, at each hatch, four labourers, servants of the stevedores, in the hold, their duty being simply to fill the coal baskets and hook them on to the rope by which they were lifted, and to unhook the empty baskets as they were let down. The lifting tackle was actuated by steam from the ship's boilers, and was attended to by two men, who were members of her crew, and received their wages from the appellants. One of these men worked the winch. The other was stationed beside the hatch; and it was his business to give the winchman notice whenever a loaded basket was ready for raising, and also to steady and guide the basket in its ascent by means of a rope called a bullrope. A man named John Eames acted as foreman or ganger on board the *Orowaiti,* in the interest of the stevedores.

By the witnesses for the respondent his injuries were attributed to the negligent conduct of the winchman in first raising a loaded basket, without notice from the bullrope man, and before the latter was ready, and in then letting go the winch, and allowing the load to fall back into the hold, where it struck the respondent.

At the close of the evidence, the jury were asked to determine the quantum of damage, which they assessed at £1600. With the exception of that point the case was withdrawn from the jury, under an arrangement, which was thus noted by the presiding judge, "negligence admitted. Agreed to leave question of common employment to Court."

It must therefore be taken against the appellants that the mishap which befell the respondent was due to the winchman, for whose negligence they are responsible, if, at the time when it occurred, he was employed by them, and was acting within the scope of his employment. They maintain, however, that the winchman, and the bullrope man also, in assisting to unload the vessel, were not employed in their behalf, but were engaged in doing work which the stevedores had contracted for, subject to the orders and control of the foreman appointed by the contractors. Whether that was the case or not is a question of fact, upon which the parties prefer the verdict of the Court to that of a jury.

That the servant of A. may, on a particular occasion, and for a particular purpose, become the servant of B., notwithstanding that he continues in A.'s service and is paid by him, is a rule recognised by a series of decisions. Their Lordships do not find it necessary for the purposes of this appeal to examine these authorities. It is possible that, in some cases, questions of nicety might arise in the application of the rule to the facts, and that the opinions expressed by learned judges in these authorities might aid in their solution. But no such questions appear to their Lordships to arise upon the evidence in this case.

The contract under which the cargo of the *Orowaiti* was discharged did not provide that the whole work was to be done by the stevedore. On the contrary, whilst the contractor was bound "to supply all labour for filling buckets or baskets, working tramways, &c.," the company expressly undertook to provide one winch-driver and one hatchman, for each hatch being discharged, the hatchman to attend yard-arm tackle, bullrope, or tramway, according to the method of working adopted by the contractor. There is nothing to suggest that the contractor was to have any control over the men discharging the duties of winchman and bullrope man. The inference which their Lordships would naturally derive from the terms of the contract is, that, as they admittedly did in the case of their engineer who supplied the motive power, the shipowners desired to retain control over those members of their crew who worked the tackle of the ship used for the purpose of discharging her cargo. That inference is certainly not displaced by the evidence led before the jury, which shews that, in point of fact, the stevedores and their foremen never gave any orders to the men at the winch or the bullrope men, or attempted to exercise any control over them.

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In these circumstances, their Lordships have had no hesitation in preferring the view taken by the Court of Appeal to that which commended itself to the learned judge who presided at the trial; and they will therefore humbly advise Her Majesty to affirm the judgment appealed from. The costs of this appeal must be paid by the appellants.

Solicitors for appellant: *A. R. & H. Steele.*
Solicitors for respondent: *Wilkins, Blyth, Dutton, & Hartley.*

[PRIVY COUNCIL.]

J. C.*
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Dec. 12, 13.
1894
Feb. 24.

THE ATTORNEY-GENERAL OF ONTARIO . . . . PLAINTIFF;

AND

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

British North America Act, 1867, *ss.* 91, 92—*Powers of Local Legislation—Enactment ancillary to Bankruptcy Law—Revised Statutes of Ontario,* c. 124, s. 9.

Held, that the provisions of sect. 9 of Ontario "Act respecting assignments and preferences by insolvent persons" (Revised Statutes of Ontario, c. 124), which relate to assignments purely voluntary, and postpone thereto judgments and executions not completely executed by payment, are merely ancillary to bankruptcy law, and as such are within the competence of the provincial legislature so long as they do not conflict with any existing bankruptcy legislation of the Dominion Parliament.

APPEAL from a judgment of the Court of Appeal (May 9, 1893) upon a question referred to them by the Lieut.-Governor of Ontario, under Ontario Act (53 Vict. c. 13), "as to the jurisdiction of the legislature of Ontario to enact sect. 9 of the Revised Statutes of Ontario, 1887, c. 124, entitled 'An Act respecting Assignments and Preferences by Insolvent Persons.'"

The Court, composed of Hagarty, C.J., Burton, Osler,

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* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD MACNAGHTEN, LORD SHAND, and SIR RICHARD COUCH.

ATTORNEY-GENERAL OF ONTARIO
v.
ATTORNEY-GENERAL FOR THE DOMINION OF CANADA.

Macclennan, JJ.A., answered by a majority that the section was not within the powers of the provincial legislature.

The case is reported in 20 Ontario Appeals, p. 489. Sect. 9 is set out in the judgment of their Lordships.

Edward Blake, Q.C. (Canadian bar), *Haldane*, Q.C., and *Bray*, for the appellant :—

The effect of sect. 9 is merely to prevent a first execution creditor from securing a preference over other creditors; that is, it takes away or modifies the privileges of execution creditors. It is contended, and not seriously disputed, that to do so is within the competence of the provincial legislature as being within more than one of the enumerations in sect. 92 of the British North America Act, 1867, viz., " property and civil rights," " administration of justice," " procedure in civil cases," and " local and private matters." The question is whether sect. 91, under the head of " bankruptcy and insolvency," effects a withdrawal of the subject of this clause from the provincial legislature. The presumption, at all events, is in favour of the validity of the impugned Act: see *Valin* v. *Langlois* (1). With regard to the withdrawal of provisional legislative authority by sect. 91, art. 21, it was contended, first, that the clause did not necessarily fall within the meaning of bankruptcy and insolvency; second, that until the Dominion Parliament has actually legislated on that subject, the powers of the provincial legislature, as exercised in this case, are not affected by the existence of general powers in the Dominion Parliament which that parliament has not thought fit to exercise. In other words, the Dominion Parliament might have authority to override the legislation of the province; but until it does so the latter stands good as being within its powers.

Before 1867 the legislation on the subject of this Ontario Act was contained in an Act of the late Province of Canada, 22 Vict. c. 96 (see especially sects. 18, 19, and 21), and in the Consolidated Statutes of Upper Canada of 1859, c. 26 (see sect. 18). The Dominion Parliament has not altered that legislation. It passed an Act respecting insolvency in 1875 (see 38 Vict. c. 16), and

(1) 5 App. Cas. 115.

repealed it in 1880 (see 43 Vict. c. 1); and since 1880 there has been no Dominion legislation on the subject of bankruptcy, or on the subject of the impugned clause 9 of the Ontario Act. The provincial legislature, on the other hand, has dealt with this subject: see Revised Statutes of Ontario, 1877, c. 118, "An Act respecting fraudulent preference of creditors by persons in insolvent circumstances," sect. 2 of which re-enacted sect. 18 of Consol. Stats. c. 26, which itself was a re-enactment of sect. 19 of 22 Vict. c. 96. [Reference was also made to Ontario Act, 47 Vict. c. 10, s. 3; 48 Vict. c. 26, preamble; amended by 49 Vict. c. 25, and by 50 Vict. c. 19.] Then came the Act in question in this case, c. 124 of the Revised Statutes of 1887, which re-enacted 48 Vict. c. 26, with its amendments. In its turn the Act of 1887 has been amended four times, but sect. 9 has remained untouched.

It was accordingly contended that the earlier sections of the impugned Act were merely re-enactments without change of principle of the original legislation of the Province of Canada; that the remaining sections, including sect. 9, relate to such procedure as is necessary to carry out the first object of a voluntary assignment, viz., to ensure amongst creditors a fair distribution of assets without undue preference. The clauses do not apply to insolvent persons only; they do not compel an insolvent to make an assignment. They do not enable a debtor to obtain a discharge from the obligation of any contract or from any liability. It was contended that, strictly speaking, they were not bankruptcy or insolvency provisions within the meaning of art. 21 of sect. 91. They are confined to prescribing procedure and the legal resulting consequences of an assignment if made. The action of the debtor is left optional and voluntary, so that the coercive legislation of bankruptcy is avoided.

Ontario Act 43 Vict. c. 10, first abolished priority amongst execution creditors, and established a procedure whereby the sheriff held for the benefit of creditors claiming within a prescribed period rateably. That Act has never been disputed, and in the absence of Dominion legislation on the same subject cannot be disputed. The present Act merely carries out the same principle.

With regard to judicial decision, there has been no case in which the validity of sect. 9 has been considered apart from the whole Act. The Act of 48 Vict. c. 26, of which the Act impugned in this case is a re-enactment, has been several times questioned, with the result that the Courts of First Instance have decided in favour of its validity, and the Court of Appeal, being equally divided, has not reversed their decision: see *Broddy* v. *Stuart* (1); *Clarkson* v. *Ontario Bank* (2); *Edgar* v. *Central Bank of Canada* (3); *Kennedy* v. *Freeman* (4); *Hunter* v. *Drummond* (5); *Union Bank* v. *Neville* (6); *Reg.* v. *County of Wellington* (7).

The decision appealed from was founded on a judgment of the Supreme Court in *Quirt* v. *The Queen* (8). It was contended that that case was distinguishable, and that the Court below was wrong in considering itself bound by it.

The Privy Council decisions cited were: *Bank of Toronto* v. *Lambe* (9); *L'Union St. Jacques de Montréal* v. *Belisle* (10); *Cushing* v. *Dupuy* (11); *Citizens Insurance Company* v. *Parsons* (12); *Russell* v. *The Queen* (13); *Reg.* v. *Hodge* (14). These decisions and *Valin* v. *Langlois* (15), establish five rules of construction relating to the Act of 1867—(1.) the presumption is in favour of the validity of an enactment; (2.) the enactment should be so construed as to bring it within the legislative authority: see *M'Leod* v. *Government for New South Wales* (16); (3.) the true nature and construction of the enactment must be determined in order to ascertain the class of subject to which it really relates; (4.) it must be ascertained if the subject falls within sect. 92, and if so, whether the Court is compelled by sect. 91 or other sections to cut down the full meaning of sect. 92, so that it shall not include the subject of the impugned Act; (5.) subjects which in one aspect fall within sect. 92 may in another aspect and for another purpose fall within sect. 91. Applying these rules, it was contended that the provisions of this Act may have been ancillary to a scheme of bankruptcy, but were not of the essence of it so as to be within the exclusive power of the Dominion.

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(1) Canadian Law Times, vol. vii. p. 6.

(2) 15 Ont. App. 166.

(3) 15 Ont. App. 196.

(4) 15 Ont. App. 216.

(5) 15 Ont. App. 232.

(6) 21 Ont. Rep. 152.

(7) 17 Ont. Rep. 615; 17 Ont. App. Rep. 421.

(8) 19 Sup. Ct. Can. 510.

(9) 12 App. Cas. 575.

(10) Law Rep. 6 P. C. 31.

(11) 5 App. Cas. 409.

(12) 7 App. Cas. 96.

(13) 7 App. Cas. 829.

(14) 9 App. Cas. 117.

(15) 5 App. Cas. 115.

(16) [1891] A. C. 455.

Sir *Richard Webster*, Q.C., and *Carson*, Q.C., for the respondent:—

In considering whether sect. 9 is ultrà vires the provincial legislature, the whole Act, c. 124, must be considered. It cannot be considered apart from those sections especially which relate to the effect of assignments for the general benefit of creditors, to the proceedings consequent upon such assignment, and to the position of an assignee thereunder. Such assignments necessarily contemplate the insolvency of the assignor; they would not be made under any other circumstances; moreover, the particular assignments contemplated by the impugned Act are the only assignments to which sect. 9 relates, and in all cases it is the sheriff of the county who is to be the assignee, unless with the consent of a majority of the creditors; clearly shewing that the consequences in view are those relating to the remedies of creditors in view of actual insolvency. It is not necessary in order to bring this Act within art. 21 of sect. 91 to shew that it contains compulsory provisions as to the disposal of an insolvent's estate. Voluntary assignments for the purpose of effecting that disposal are a necessary part of a bankruptcy system. When all the provisions are considered as a whole, it results that they, including sect. 9, relate to bankruptcy and insolvency within the meaning of sect. 91. The section impugned is in effect a part of a system of bankruptcy and insolvency which had been enacted, enforced, and then repealed by the Dominion Parliament. Reference was made to an Act of 1864 of the Province of Canada (27 & 28 Vict. c. 17) and to Dominion Act 32 & 33 Vict. c. 16, a Bankruptcy Act which contained provisions for voluntary liquidation, which was amended in 1875 by 38 Vict. c. 16, and further amended in 1877 and 1878, and then repealed by 43 Vict. c. 1, which abolished the Insolvency Acts theretofore in force in Canada. Thus the Dominion

Parliament decided deliberately to have no bankruptcy and insolvency system in the Dominion. The province by the impugned Act has attempted to override and reverse that decision by re-enacting part of the repealed legislation, or enacting provisions precisely similar to those which the Dominion had rejected. This re-enactment in defiance of the Dominion Parliament was beyond the competence of the Ontario Legislature. [THE LORD CHANCELLOR:—This seems to be a common law assignment for the benefit of the creditors, and does not necessarily relate to bankruptcy. It may be outside the bankruptcy law.] By the law of England as it existed in 1867, and from before the reign of George IV., it was contended that such an assignment as is contemplated by the impugned Act was known as an act of bankruptcy whether made in England or abroad. In using the expression "bankruptcy and insolvency" in sect. 91 of the Act of that year, parliament must have contemplated such things as were known to the bankruptcy and insolvency system of the Imperial Parliament, not excluding such things as would be known to a bankruptcy and insolvency system existing in the Canadian provinces. In effect sect. 9 is a part of a system of bankruptcy and insolvency, i.e., a part of a system which had been enacted by the Dominion and then abolished. What the province has done by this Act is not when fairly considered ancillary to a system which the Dominion might have prescribed, but it is in substance a declaration that laws shall exist in the province which the Dominion has decided by virtue of its exclusive authority under sect. 91 shall not so exist.

Blake, Q.C., replied.

1894
Feb. 24.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

This appeal is presented by the Attorney-General of Ontario against a decision of the Court of Appeal of that province.

The decision complained of was an answer given to a question referred to that Court by the Lieutenant-Governor of the province in pursuance of an Order in Council.

J. C.
1894
ATTORNEY-GENERAL OF ONTARIO
v.
ATTORNEY-GENERAL FOR THE DOMINION OF CANADA.

The question was as follows:—

"Had the Legislature of Ontario jurisdiction to enact the 9th section of the Revised Statutes of Ontario, c. 124, and entitled 'An Act respecting Assignments and Preferences by Insolvent Persons'?"

The majority of the Court answered this question in the negative; but one of the judges who formed the majority only concurred with his brethren because he thought the case was governed by a previous decision of the same Court; had he considered the matter res integra he would have decided the other way. The Court was thus equally divided in opinion.

It is not contested that the enactment, the validity of which is in question, is within the legislative powers conferred on the provincial legislature by sect. 92 of the British North America Act, 1867, which enables that legislature to make laws in relation to property and civil rights in the province unless it is withdrawn from their legislative competency by the provisions of the 91st section of that Act which confers upon the Dominion Parliament the exclusive power of legislation with reference to bankruptcy and insolvency.

The point to be determined, therefore, is the meaning of those words in sect. 91 of the British North America Act, 1867, and whether they render the enactment impeached ultrà vires of the provincial legislature. That enactment is sect. 9 of the Revised Statutes of Ontario of 1887, c. 124, entitled "An Act respecting Assignment and Preferences by Insolvent Persons." The section is as follows:—

"An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs, who has the first execution in the sheriff's hands."

In order to understand the effect of this enactment it is necessary to have recourse to other sections of the Act to see what is meant by the words "an assignment for the general benefit of creditors under this Act."

The first section enacts that if any person in insolvent circumstances, or knowing himself to be on the eve of insolvency, voluntarily confesses judgment, or gives a warrant of attorney to confess judgment, with intent to defeat or delay his creditors, or to give any creditor a preference over his other creditors, every such confession or warrant of attorney shall be void as against the creditors of the party giving it.

The 2nd section avoids as against the other creditors any gift or assignment of goods or other property made by a person at a time when he is in insolvent circumstances, or knows that he is on the eve of insolvency, with intent to defeat, delay, or prejudice his creditors or give any of them a preference.

Then follows sect. 3, which is important:—

Its 1st sub-section provides that nothing in the preceding section shall apply to an assignment made to the sheriff of a county in which the debtor resides or carries on business, or to any assignee resident within the province with the consent of his creditors as thereinafter provided for the purpose of paying, rateably and proportionately, and without preference or priority all the creditors of the debtor their just debts.

The 2nd sub-section enacts that every assignment for the general benefit of creditors which is not void under sect. 2 but is not made to the sheriff nor to any other person with the prescribed consent of the creditors shall be void as against a subsequent assignment which is in conformity with the Act, and shall be subject in other respects to the provisions of the Act, until and unless a subsequent assignment is executed in accordance therewith.

The 5th sub-section states the nature of the consent of the creditors which is requisite for assignment in the first instance to some person other than the sheriff.

These are the only sections to which it is necessary to refer in order to explain the meaning of sect. 9.

Before discussing the effect of the enactments to which attention has been called, it will be convenient to glance at the course of legislation in relation to this and cognate matters both in the province and in the Dominion. The enactments of the 1st and 2nd sections of the Act of 1887 are to be found in substance in sects. 18 and 19 of the Act of the Province of Canada passed in 1858 for the better prevention of fraud. There is a proviso to the latter section which excepts from its operation any assignment made for the purpose of paying all the creditors of the debtor rateably without preference. These provisions were repeated in the Revised Statutes of Ontario, 1877, c. 118. A slight amendment was made by the Act of 1884, and it was as thus amended that they were re-enacted in 1887. At the time when the statute of 1858 was passed there was no bankruptcy law in force in the Province of Canada. In the year 1864 an Act respecting insolvency was enacted. It applied in Lower Canada to traders only; in Upper Canada to all persons whether traders or non-traders. It provided that a debtor should be deemed insolvent and his estate should become subject to compulsory liquidation if he committed certain acts similar to those which had for a long period been made acts of bankruptcy in this country. Among these acts were the assignment or the procuring of his property to be seized in execution with intent to defeat or delay his creditors, and also a general assignment of his property for the benefit of his creditors otherwise than in manner provided by the statute. A person who was unable to meet his engagements might avoid compulsory liquidation by making an assignment of his estate in the manner provided by that Act; but unless he made such an assignment within the time limited the liquidation became compulsory.

This Act was in operation at the time when the British North America Act came into force.

In 1869 the Dominion Parliament passed an Insolvency Act which proceeded on much the same lines as the Provincial Act of 1864, but applied to traders only. This Act was repealed by a new Insolvency Act of 1875, which, after being twice amended, was, together with the Amending Acts, repealed in 1880.

In 1887, the same year in which the Act under consideration was passed, the provincial legislature abolished priority amongst creditors by an execution in the High Court and county courts, and provided for the distribution of any moneys levied on an execution rateably amongst all execution creditors, and all other creditors who within a month delivered to the sheriff writs and certificates obtained in the manner provided for by that Act.

Their Lordships proceed now to consider the nature of the enactment said to be ultrà vires. It postpones judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the Act. Now there can be no doubt that the effect to be given to judgments and executions and the manner and extent to which they may be made available for the recovery of debts are primâ facie within the legislative powers of the provincial parliament. Executions are a part of the machinery by which debts are recovered, and are subject to regulation by that parliament. A creditor has no inherent right to have his debt satisfied by means of a levy by the sheriff, or to any priority in respect of such levy. The execution is a mere creature of the law which may determine and regulate the rights to which it gives rise. The Act of 1887 which abolished priority as amongst execution creditors provided a simple means by which every creditor might obtain a share in the distribution of moneys levied under an execution by any particular creditor. The other Act of the same year, containing the section which is impeached, goes a step further, and gives to all creditors under an assignment for their general benefit a right to a rateable share of the assets of the debtor, including those which have been seized in execution.

But it is argued that inasmuch as this assignment contemplates the insolvency of the debtor, and would only be made if he were insolvent, such a provision purports to deal with insolvency, and therefore is a matter exclusively within the jurisdiction of the Dominion Parliament. Now it is to be observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law quite independently of any system of bankruptcy or insolvency, or any legislation relating thereto. So far from being regarded as an essential part of the bankruptcy law, such an assignment was made an act of bankruptcy on which an adjudication might be founded, and by the law of the Province of Canada which prevailed at the

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time when the Dominion Act was passed, it was one of the grounds for an adjudication of insolvency.

It is to be observed that the word "bankruptcy" was apparently not used in Canadian legislation, but the insolvency law of the Province of Canada was precisely analogous to what was known in England as the bankruptcy law.

Moreover, the operation of an assignment for the benefit of creditors was precisely the same, whether the assignor was or was not in fact insolvent. It was open to any debtor who might deem his solvency doubtful, and who desired in that case that his creditors should be equitably dealt with, to make an assignment for their benefit. The validity of the assignment and its effect would in no way depend on the insolvency of the assignor, and their Lordships think it clear that the 9th section would equally apply whether the assignor was or was not insolvent. Stress was laid on the fact that the enactment relates only to an assignment under the Act containing the section, and that the Act prescribes that the sheriff of the county is to be the assignee unless a majority of the creditors consent to some other assignee being named. This does not appear to their Lordships to be material. If the enactment would have been intrà vires, supposing sect. 9 had applied to all assignments without these restrictions, it seems difficult to contend that it became ultrà vires by reason of them. Moreover, it is to be observed that by sub-sect. 2 of sect. 3, assignments for the benefit of creditors not made to the sheriff or to other persons with the prescribed consent, although they are rendered void as against assignments so made, are nevertheless, unless and until so avoided, to be "subject in other respects to the provisions" of the Act.

At the time when the British North America Act was passed bankruptcy and insolvency legislation existed, and was based on very similar provisions both in Great Britain and the Province of Canada. Attention has already been drawn to the Canadian Act.

The English Act then in force was that of 1861. That Act applied to traders and non-traders alike. Prior to that date the operation of the Bankruptcy Acts had been confined to traders. The statutes relating to insolvent debtors, other than traders, had been designed to provide for their release from custody on their making an assignment of the whole of their estate for the benefit of their creditors.

It is not necessary to refer in detail to the provisions of the Act of 1861. It is enough to say that it provided for a legal adjudication in bankruptcy with the consequence that the bankrupt was divested of all his property and its distribution amongst his creditors was provided for.

It is not necessary in their Lordships' opinion, nor would it be expedient to attempt to define, what is covered by the words "bankruptcy" and "insolvency" in sect. 91 of the British North America Act. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their Lordships the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate.

In their Lordships' opinion these considerations must be borne in mind when interpreting the words "bankruptcy" and "insolvency" in the British North America Act. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such

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matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

Their Lordships will therefore humbly advise Her Majesty that the decision of the Court of Appeal ought to be reversed, and that the question ought to be answered in the affirmative. The parties will bear their own costs of this appeal.

Solicitors for the appellant: *Freshfields & Williams.*

Solicitors for the respondent: *Bompas, Bischoff & Co.*

[HOUSE OF LORDS.]

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May 10.

HAMLYN & CO. . . . . APPELLANTS;

AND

TALISKER DISTILLERY AND OTHERS . RESPONDENTS.

Conflict of Laws—Scotch and English Law—Contract—Locus solutionis—Reference to unnamed Arbitrators—Intention—Arbitration Act, 1889 (52 *&* 53 *Vict. c.* 49), *s.* 4.

Where a contract is entered into between parties residing in different countries where different systems of law prevail, it is a question in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined.

A contract between an English and a Scotch firm, signed in London but to be performed in Scotland, contained this stipulation: "Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way."

In an action raised by the Scotch firm in Scotland for implement of the contract and for damages, the English firm pleaded that the action was excluded by the arbitration clause. The Scotch Courts held that the clause was governed by the law of Scotland, inasmuch as that country was the locus solutionis, and that the reference, being to arbitrators unnamed, was therefore invalid:—

Held, reversing the decision of the Court of Session (21 Court Sess. Cas. 4th Series (Rettie), 204), that the contract was governed by English law, according to which the arbitration clause was valid, and deprived the Scotch Courts of jurisdiction to decide upon the merits of the case, unless the arbitration proved abortive.

APPEAL from interlocutors of the Court of Session, Scotland (Lords Adam and M'Laren, Lord Kinnear dissenting) (1).

The action was raised at the instance of the Talisker Distillery, Skye, now represented by the respondents, in right of the extinct firm of R. Kemp & Co., late owners of the said distillery, against Messrs. Hamlyn & Co., merchants in London, the appellants, for damages and implement of an agreement entered into on the 27th of January, 1892, between Kemp & Co. and Hamlyn & Co.

Kemp & Co. transferred all their interest in the Talisker

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(1) 21 Court Sess. Cas. 4th Series (Rettie), 204.

Distillery to A. G. Allan who, in March, 1893, raised this action, but, he dying on the 16th of August, 1893, his executors and trustees, the other respondents, continued the action.

By the agreement in question Hamlyn & Co. agreed to purchase all grains made by Kemp & Co., or their nominees and assigns, at the price of 1*s.* 8*d.* per quarter, and further, to supply and erect at the Talisker Distillery a patent grain-drying machine, such machine to remain the property of Hamlyn & Co. And Kemp & Co. agreed to work and keep in proper repair the said drying machine, supplying all steam and labour, &c., necessary for properly drying the grain for Hamlyn & Co., and to bag up the grain in the latter company's sacks, and deliver the dried grain free on board at Carbost, Skye, to their order or otherwise as required. The contract was to be in force for ten years from the date of the erection of the machine, and at the expiration of that term Hamlyn & Co. were to be at liberty to take away the drying machine.

The agreement, which was signed in London, contained this clause: " Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way."

The late pursuer, now represented by the respondents, being domiciled in Scotland, and the appellants domiciled in England, and, therefore, not subject to the jurisdiction of the Scotch Courts, the pursuer arrested upon the dependence of the action some empty sacks, of the value of £3 6*s.* 8*d.*, belonging to the appellants, and by this arrestment subjected them to the jurisdiction of the Scotch Courts. It appeared that the primary purpose of the action was to have it declared that the appellants are bound to implement their part of the contract with Kemp & Co. by purchasing the grains contracted for, and the summons concluded for damages for breach of contract.

The appellants lodged defences upon the merits, but took the preliminary plea that the action was excluded by the clause of reference. The respondents maintained that this plea was bad because the reference clause, being a submission to unnamed arbiters, was invalid by the law of Scotland. The appellants admitted this, but contended that the agreement and clause of reference were good by the law of England. The question, therefore, came to be, which law was to govern.

On the 6th of July, 1893, the Lord Ordinary (Kyllachy) repelled the appellants' pleas, and sent the cause to proof.

The appellants reclaimed. After the appeal to the Court of Session had been set down for hearing A. G. Allan died, and his trustees and executors were on the 18th of October, 1893, sisted as pursuers in his stead.

On the 30th of November, 1893, the First Division (Lord Kinnear dissenting) adhered to the Lord Ordinary's interlocutor (1).

April 10, 12, 13. Sir *Henry James*, Q.C., and *A. Graham Murray*, Q.C. (of the Scotch Bar), (with them, *A. H. Ruegg*), for the appellants:—

The question is whether the arbitration clause restricts the parties to the tribunal which they have selected, or whether they are at liberty to resort to the Courts. If the respondents are right, the clause is a nullity. The intention of the parties must ascertain the law which is to control the contract, and the law which is to prevail is here indicated by the language of the clause itself.

Fry, L.J., said, in *In re Missouri Steamship Company* (2): "The law which would make the contract valid in all particulars is the law to regulate the conduct of the parties." Either of the presumptions that the lex loci contractûs, or lex loci solutionis, governs the contract may be displaced by other terms of the contract or the circumstances of the case shewing the intention: see *Jacobs* v. *Crédit Lyonnais* (3). If, instead of a general reference to members of the London Corn Exchange, the reference had been to "A. B." and "C. D." of the same place, the Scotch Courts would have given effect to it, and the arbitration would have been conducted in England: *Levy & Co.* v. *Thomson* (4). The Scotch rule as to the validity of a reference to unnamed arbitrators is not founded upon principle or on public policy.

(1) 21 Court Sess. Cas. 4th Series (Rettie), 204.

(2) 42 Ch. D. 321, at p. 341.

(3) 12 Q. B. D. 589, at p. 600.

(4) 10 Court Sess. Cas. 4th Series, 1134.

[They also cited *Buchanan* v. *Muirhead* (1); *Tancred, Arrol & Co.* v. *Steel Company of Scotland* (2); *Caledonian Insurance Company* v. *Gilmour* (3).]

The Lord Advocate (*J. B. Balfour*, Q.C.), and *Danckwerts*, for the respondents:—

This is a Scotch contract to be governed by Scotch law, for all the stipulations of the contract were to be carried out in Scotland. Besides, this is a matter of remedy, and whatever relates to the remedy is to be governed by the law of the lex fori: *Don* v. *Lippman* (4). See also Tindal, C.J., in *Huber* v. *Steiner* (5). The Scotch cases shewed that a provision designed for the purpose of ousting the jurisdiction of the Courts was contrary to public policy, and whatever may be the validity of such a submission to arbitration elsewhere, the Scotch Courts do not recognise a reference where the arbitrators are unnamed: *Ramsay* v. *Strain* (6); *Scott* v. *Avery* (7); *Tancred, Arrol & Co.* v. *Steel Company of Scotland* (8); *Campbell* v. *Shaws Water Company* (9). By the English arbitration law the jurisdiction of the Court is not ousted and the Court has a discretion as to staying legal proceedings commenced by one party to a submission against the other party: *Russell* v. *Russell* (10); *Lyon* v. *Johnson* (11); *In re Carlisle, Clegg* v. *Clegg* (12); see also *Hyman* v. *Helm* (13); *Ewing* v. *Orr Ewing* (14). It follows that the appellants seek to apply to the contract a law neither English or Scotch, and thus to oust the jurisdiction of the Scotch Court. Here there are many circumstances which make it proper that the Scotch action should not be stayed.

[They also cited *In re Dawdy* (15); Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 4, 19; and Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 17.]

(1) June 25, 1799. Mor. Dict. 14,593.

(2) 15 App. Cas. 125.

(3) [1893] A. C. 85.

(4) 2 Sh. & McL. at p. 723.

(5) 2 Bing. (N.S.) at p. 210.

(6) 11 Court Sess. Cas. 4th Series (Rettie), 527, at p. 530.

(7) 5 H. L. C. 811.

(8) 15 App. Cas. at p. 141.

(9) 2 Court Sess. Cas. 3rd Series (Macpherson), 1130.

(10) 14 Ch. D. 471.

(11) 40 Ch. D. 579.

(12) 44 Ch. D. 200.

(13) 24 Ch. D. 531.

(14) 10 App. Cas. at p. 499.

(15) 15 Q. B. D. 426.

A. Graham Murray, Q.C., in reply:—

A submission to arbitration in Scotland or England does not oust the jurisdiction of the Courts. Even where there is a valid reference to arbitration it is open to the Court at its own discretion to either dismiss the action or stay it pending the arbitration: *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company* (1).

Judgment after consideration.

Lord Herschell, L.C.:—

My Lords, on the 27th of January, 1892, an agreement was entered into between Roderick Kemp & Co. of the Talisker Distillery, Carbost, Isle of Skye, and Hamlyn & Co. of London, under which Hamlyn & Co. were to supply to the distillery a patent drying machine which was to be worked by the distillery company, who were to bag up and deliver to Hamlyn & Co. dried grain free on board at Carbost to their order or otherwise as required. The agreement concludes with a clause in the following terms: "Should any dispute arise out of this contract the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." This agreement was made between the parties in England.

Shortly after the contract was entered into Alexander Grigor Allan became the sole partner in the firm of Roderick Kemp & Co., and the present action was instituted by him in Scotland in respect of an alleged breach of the contract. The defenders pleaded that the Court of Session had "no jurisdiction," and that "the action is excluded by the clause of reference in the memorandum of agreement." These pleas were repelled by the Lord Ordinary, and his judgment was affirmed by Lord Adam and Lord M'Laren, in the Inner House, Lord Kinnear dissenting. During the course of the litigation the pursuer died, and is now represented by the respondents.

It is not in controversy that the arbitration clause is, according to the law of England, a valid and binding contract between

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(1) 10 Court Sess. Cas. 3rd Series (Macpherson), 892.

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the parties, nor that according to the law of Scotland it is wholly invalid inasmuch as the arbiters are not named. The view taken by the majority of the Court below is thus expressed by Lord Adam: "So far as I see, nothing required to be done in England in implement of the contract. That being so, I am of opinion with the Lord Ordinary that the construction and effect of the agreement, and of all and each of its stipulations, is to be determined by the lex loci solutionis, that is, by the law of Scotland."

It is not denied that the conclusion thus arrived at renders the arbitration clause wholly inoperative, and thus defeats the expressed intention of the parties, but this is treated as inevitably following from the rule of law that the rights of the parties must be wholly determined by the lex loci solutionis. I am not able altogether to agree with the view taken by the learned Lord that everything required to be done in implement of the contract was to be done in Scotland, inasmuch as it appears to me that the arbitration clause which I have read to your Lordships does not indicate that that part of the contract between the parties was to be implemented by performance in Scotland. That clause is as much a part of the contract as any other clause of the contract, and certainly there is nothing on the face of it to indicate, but quite the contrary, that it was in the contemplation of the parties that it should be implemented in Scotland.

The learned judges in the Court below treat the lex loci solutionis of the main portion of the contract as conclusively determining that all the rights of the parties under the contract must be governed by the law of that place. I am unable to agree with them in this conclusion. Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, no doubt the lex loci solutionis is a matter of great importance. The lex loci contractûs is also of importance. In the present case the place of the contract was different from the place of its performance. It is not necessary to enter upon the inquiry, which was a good deal discussed at the bar, to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made, or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated are entering into a contract, to indicate by the terms which they employ, which system of law they intend to be applied to the construction of the contract and to the determination of the rights arising out of it.

Now in the present case it appears to me that the language of the arbitration clause indicates very clearly that the parties intended that the rights under that clause should be determined according to the law of England. As I have said, the contract was made there; one of the parties was residing there. Where under such circumstances the parties agree that any dispute arising out of their contract shall be "settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way," it seems to me that they have indicated as clearly as it is possible their intention that that particular stipulation, which is a part of the contract between them, shall be interpreted according to and governed by the law, not of Scotland, but of England, and I am aware of nothing which stands in the way of the intention of the parties, thus indicated by the contract they entered into, being carried into effect. As I have already pointed out, the contract with reference to arbitration would have been absolutely null and void if it were to be governed by the law of Scotland. That cannot have been the intention of the parties; it is not reasonable to attribute that intention to them if the contract may be otherwise construed; and, for the reasons which I have given, I see no difficulty whatever in construing the language used as an indication that the contract, or that term of it, was to be governed and regulated by the law of England.

But then it is said that the Scotch Court is asked to enforce a law which is against the public policy of the law of Scotland, and that although the parties may have so contracted the Courts in Scotland cannot be bound to enforce a contract which is against the policy of their law. I should be prepared to admit that an agreement which was opposed to a fundamental principle of the law of Scotland founded on considerations of public policy could not be relied upon and insisted upon in the Courts of Scotland; and if according to the law of Scotland the Courts never allowed their jurisdiction to try the merits of a case to be interfered with by an arbitration clause, there would be considerable force in the contention which was urged by the respondents. But that is not the case. The Courts in Scotland recognise the right of the parties to a contract to determine that any disputes under it shall be settled, not in the ordinary course of litigation, but by an arbitration tribunal selected by the parties. If in the present case the arbitrators had been named, the Courts in Scotland would have recognised and given effect to and enforced the arbitration clause, and would by reason of it have declined to enter upon a trial of the merits of the case. That being so, I have been unable to understand upon what fundamental principle of public policy the rule can be said to rest that where an arbitrator is not named an agreement between the parties to refer a matter to arbitration ought not to be enforced.

It is not necessary to inquire into the history of the distinction which has arisen in the Courts of Scotland between arbitration clauses where arbiters are named and clauses with an unnamed arbiter. It is sufficient to say that when once it is admitted, as it must be, that the Courts of Scotland do enforce and give effect to an arbitration clause, and hold their hands from the determination of the merits by reason of the parties having agreed upon it, it seems to me to follow that if this arbitration clause is to be interpreted according to the law of England, and

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is therefore a valid arbitration clause, there is no reason why the Courts in Scotland should not give effect to it just as much as if it were a valid arbitration clause according to the law of Scotland.

But then it is argued that an agreement to refer disputes to arbitration deals with the remedy and not with the rights of the parties, and that consequently the forum being Scotch the parties cannot by reason of the agreement into which they have entered interfere with the ordinary course of proceedings in the Courts of Scotland. Stated generally, I should not dispute that proposition so far as it lays down that the parties cannot, in a case where the merits fall to be determined in the Scotch Courts, insist, by virtue of an agreement, that those Courts shall depart from their ordinary course of procedure. But that is not really the question which has to be determined in the present case. The question which has to be determined is whether it is a case in which the Courts of Scotland ought to entertain the merits and adjudicate upon them. If it were such a case, then no doubt the ordinary course of procedure in the Scotch Courts would have to be followed; but the preliminary question has to be determined whether by virtue of a valid clause of arbitration the proper course is for the Courts in Scotland not to adjudicate upon the merits of the case, but to leave the matter to be determined by the tribunal to which the parties have agreed to refer it. Viewed in that light, I can see no difficulty; and the argument that to give effect to this arbitration clause would interfere with the course of procedure in the forum in which the action is pending seems to me entirely to fail. For these reasons I move that the judgment appealed from be reversed.

The question then arises what course should be taken in the present case, whether the action should be stayed until the arbitration is completed or whether the House should make an order remitting the cause to be determined pursuant to the arbitration clause. My Lords, I am quite satisfied, upon that part of the case, with the suggestion which will be made by my noble and learned friend who will follow me (Lord Watson), and I think that there is really no difficulty in the manner in which he proposes to give effect to the contract between the parties.

LORD WATSON :—

This action was brought in the Court of Session by a Scotch distiller, who died during its dependence, and is now represented by the respondents, against the appellant firm, who are merchants in London, concluding for damages in respect of their breach of a mercantile contract. For the purposes of this appeal, it is sufficient to say that the contract which was made in England, but fell to be mutually performed in Scotland, contains this provision: "Should any dispute arise out of this contract, the same to be settled by two members of the London Corn Exchange, or their umpire, in the usual way."

In defence, the appellants pleaded, "(1.) No jurisdiction; (2.) The action is excluded by the clause of reference." Both pleas were exclusively founded upon the agreement to refer. They were repelled by the Lord Ordinary (Kyllachy), and, in the First Division, by Lords Adam and M'Laren, Lord Kinnear dissenting. The learned judges of the majority were of opinion, with the Lord Ordinary, that, inasmuch as Scotland was admittedly the locus solutionis, the whole stipulations of the contract, including the clause of reference, must be governed by Scotch law. In that view, the agreement to refer, being to arbiters unnamed, was plainly invalid; and their Lordships accordingly sent the case to proof before the Lord Ordinary.

With reference to the two pleas which have been repelled, I wish to observe that, although they seem to have become stereotyped in cases like the present, they do not correctly represent the rights of a defender who relies upon a valid contract to submit the matter in dispute to arbitration. The jurisdiction of the Court is not wholly ousted by such a contract. It deprives the Court of jurisdiction to inquire into and decide the merits of the case, whilst it leaves the Court free to entertain the suit, and to pronounce a decree in conformity with the award of the arbiter. Should the arbitration, from any cause, prove abortive, the full jurisdiction of the Court will revive, to the effect of enabling it to hear and determine the action upon its merits. When a binding reference is pleaded in limine, the proper course to take is either to refer the question in dispute to the arbiter named or to stay procedure until it has been settled by arbitration.

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Lord Watson.

The latter course was adopted in *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company* (1), where the reference was to arbiters unnamed, but had been confirmed by statute. I cite that case, not as establishing, but as illustrating the rule of procedure, which was in force long before its date.

The first question in this appeal is, whether the law of England or the law of Scotland applies to the interpretation of the clause of reference. If the law of Scotland must prevail, the judgments appealed from are unimpeachable. If, on the other hand, the contract must be governed by English law, the clause of reference is obligatory according to that law; and, in that event, the further question arises whether the Courts of Scotland ought to give the same effect to it as if it had been a binding Scotch covenant.

Upon the first of these questions, I have been unable to arrive at the same conclusion with the Courts below. When two parties living under different systems of law enter into a personal contract, which of these systems must be applied to its construction depends upon their mutual intention, either as expressed in their contract, or as derivable by fair implication from its terms. In the absence of any other clear expression of their intention, it is necessary and legitimate to take into account the circumstances attendant upon the making of the contract and the course of performing its stipulations contemplated by the parties; and amongst these considerations, the locus contractûs and the locus solutionis have always been regarded as of importance, although English and Scotch decisions differ in regard to the relative weight which ought to be attributed to them when the place of contracting is in one forum, and the place of performance in another. In the present case it does not appear to me to be necessary to discuss the relative value of these considerations, because, in my opinion, the clause of reference is expressed in terms which clearly indicate that the parties had in contemplation and agreed that it should be interpreted according to the rules of English law. If they had stipulated that all disputes arising out of the contract were to be decided in the Court of Session, I should have been of opinion that they had in view the principles of Scotch law, and meant that their mutual stipulations should be construed according to these principles. And, to my mind, their selection from the membership of a commercial body in London of a conventional tribunal which is to act "in the usual way," or, in other words, in the manner which is customary in London, indicates, not less conclusively, that, in agreeing to such an arbitration they were contracting with reference to the law of England.

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(1) 10 Court Sess. Cas. 3rd Series (Macpherson), 892.

Upon the assumption that the contract must be read in the light of English law, the respondents maintained that, in so far as concerns the agreement to refer, that law is inadmissible. They argued that the agreement relates, not to the substance of the contract, but to the remedy which the parties were to pursue; and that, according to a well-known principle of general law, all questions touching the remedy must be decided according to the rules of the forum in which the remedy is sought. They also contended that the Court of Session were not bound to recognise any reference to unnamed arbiters, whatever might be its validity elsewhere, to the effect of excluding their own jurisdiction, because its recognition would be contrary to the policy of Scotch law. Neither of these contentions is, in my opinion, well founded.

It has never, so far as I am aware, been seriously disputed, that, whatever may be the domicile of a contract, any Court which has jurisdiction to entertain an action upon it must, in the exercise of that jurisdiction, be guided by what are termed the curial rules of the lex fori, such as those which relate to procedure or to proof. *Don* v. *Lippman* (1), which is the leading Scotch authority upon the point, has settled that these rules include local laws relating to prescription or limitation. But all the rules noticed by Lord Brougham in his elaborate judgment as belonging to that class refer to the action of the Court in investigating the merits of a suit in which its jurisdiction has been already established. I can find no authority, and none was cited to us, to the effect that, in dealing with the prejudicial question whether it has jurisdiction to try the merits of the cause, the Court ought to disregard an agreement to refer which

(1) 2 Sh. & McL. 682.

is pars contractûs, and binding according to the law of the contract, because it would not be valid if tested by the lex fori. Without clear authority, I am not prepared to affirm a rule which does not appear to me to be recommended by any considerations of principle or expediency. One result of its adoption would be that, if two persons domiciled in England made a contract there containing the same clause of reference which occurs in this case, either of them could avoid the reference by bringing an action before a Scotch Court, if the other happened to be temporarily resident in Scotland, or to have personal estate in that country capable of being arrested.

The second reason advanced by the respondents for denying effect to the reference would have been more plausible if it had been the law of Scotland that no private agreement could exclude, to any extent, the jurisdiction of the ordinary tribunals. I am not disposed to hold that Scotch Courts are bound to give effect to every stipulation in a foreign contract, unless it is shewn to be contra bonos mores, in the sense of the law which they administer. There may be stipulations which, though not tainted with immorality, are yet in such direct conflict with deeply-rooted and important considerations of local policy, that her Courts would be justified in declining to recognise them. But the law of Scotland has, from the earliest times, permitted private parties to exclude the merits of any dispute between them from the consideration of the Court by simply naming their arbiter. The rule that a reference to arbiters not named cannot be enforced does not appear to me to rest upon any essential considerations of public policy. Even if an opposite inference were deducible from the authorities by which it was established, the rule has been so largely trenched upon by the legislation of the last fifty years, both in general and in local and personal Acts, that I should hesitate to affirm that the policy upon which it was originally based could now be regarded as of cardinal importance.

For these reasons I am of opinion that the interlocutors appealed from ought to be reversed, and the cause remitted, with directions to sist procedure in hoc statu, in order that the matters in dispute may be settled by arbitration in terms of the contract.

Such an order will leave the parties at liberty, in the course of the reference, to avail themselves of the provisions of the Arbitration Act, 1889, and will enable the Court of Session, in the event of any lapse of the reference, to dispose of the merits of the case.

LORD ASHBOURNE:—

I concur.

The substantial question to be determined is whether the law of Scotland or the law of England is to be applied to the interpretation of the arbitration clause in question. One of the parties was a Scotch distiller, and the parties on the other side were merchants in London. The contract was made in England, and was (apart from the arbitration clause) to be performed in Scotland. That clause, set out in the case, is of the highest importance. There is no absolute rule of law as to the way in which the intention of the parties to a contract with reference to the law of a particular place is to be ascertained. Were it not for the arbitration clause, I should assent to the conclusion that the parties contracted solely with a view to the application of the law of Scotland. Having regard, however, to the terms of that clause, I am led to the conclusion that the parties intended that it should be interpreted by the rules of the law of England alone. A contract which provided that disputes "should be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way," distinctly introduces a reference to well-known laws regulating such arbitrations, and those must be the laws of England. This interpretation gives due and full effect to every portion of the contract; whereas the arbitration clause becomes mere waste paper if it is held that the parties were contracting on the basis of the application of the law of Scotland, which would at once refuse to acknowledge the full efficacy of a clause so framed. It is more reasonable to hold that the parties contracted with the common intention of giving entire effect to every clause, rather than of mutilating or destroying one of the most important provisions.

LORDS MACNAGHTEN and MORRIS concurred.

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Lord Shand:—

My Lords, I am also of opinion that the appeal in this case should be sustained, and the judgment complained of reversed for the reasons which have already been so fully stated, and which it would serve no good purpose to repeat. From the terms in which the clause of reference is expressed in a contract, to which, it must be observed, a firm of merchants in London, and carrying on business there, is one of the parties, I think it is to be inferred to be pars contractus that the agreement which it contained for the settlement of disputes which might arise out of the contract was to be interpreted and governed by the law of England; and I am further of opinion that there are no such considerations of public policy at the basis of the rule of Scottish law in reference to the necessity of arbiters being named in order to create a binding obligation to refer, as can warrant the Courts in Scotland, in an action brought there, in refusing to give effect to the law and practice as to arbitrations in England. In accordance with the ordinary practice in Scotland, I think that procedure in the present action should be stayed to allow the arbitration to be proceeded with in England, as provided by the contract.

Lord Herschell, L.C.:—

With regard to the question of costs, I propose that the respondents pay the costs in this House and in the Court below from the date of the Lord Ordinary's interlocutor. The other costs will remain to be determined by the Court when the cause comes finally to be dealt with after the arbitration is completed.

Ordered and adjudged, That the said interlocutors of the 6*th of July,* 1893, *and the* 30*th of November,* 1893, *complained of in the said appeal, be reversed: Further ordered, That the cause be, and the same is hereby, remitted to the First Division of the Court of Session in Scotland with directions to sist procedure in hoc statu, in order that the matters in dispute may be settled by arbitration in terms of the contract constituted*

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by a "Memorandum of agreement between Messrs. Roderick Kemp & Co., of Talisker Distillery, Carbost, North Britain, distillers, of the one part; and Messrs. Hamlyn & Co., 153, *Cheapside, in the City of London, merchants, of the other part"* (*Numbers* 18 *and* 20 *of process*)*: Further ordered, That the respondents do pay to the appellants their expenses in the Court of Session from the date of the interlocutor of the Lord Ordinary of the* 6*th of July,* 1893*: And, That the respondents do pay to the appellants the costs incurred in respect of the appeal to this House.*

Lords' Journals 10th May, 1894.

Agents for appellants: *Ranger, Burton, & Frost, for Finlay & Wilson, S.S.C., Edinburgh.*

Agents for respondents: *R. S. Taylor, Son, & Humbert, for Alex. Mustard, Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)
1894
March 2.

RICHARDSON, SPENCE & CO. AND THE "LORD GOUGH" STEAMSHIP COMPANY, LIMITED . . . . APPELLANTS;

AND

MINNIE ROWNTREE . . . . RESPONDENT.

Carrier—Contract to Carry Passenger—Passenger—Ticket—Conditions on Ticket not read by Passenger—Liability of Carrier—Evidence for Jury.

The respondent paid the appellants passage money for a voyage on their steamer, and received a ticket folded up so that no writing was visible unless she opened it. Upon the ticket were the words: "It is mutually agreed for the consideration aforesaid that this ticket is issued and accepted upon the following conditions." One of the conditions was: "The company is not under any circumstances liable to an amount exceeding 100 dollars for loss of or injury to the passenger or his luggage." The respondent having brought an action against the appellants to recover damages exceeding 100 dollars for personal injuries, and the above facts having been proved, the jury found that she knew there was writing or printing on the ticket, but did not know that the writing or printing

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contained conditions relating to the terms of the contract of carriage, and that the appellants did not do what was reasonably sufficient to give her notice of the conditions, and they found a verdict for her for £100 :—

Held, affirming the judgment of the Court of Appeal, that there was evidence upon which the jury could properly find as they did, and that judgment was properly entered for the plaintiff upon those findings.

APPEAL from an order of the Court of Appeal (Lord Esher M.R., Lindley and Lopes L.JJ. (1) dismissing an application by the appellants to set aside a verdict and judgment for the respondent for £100 in an action brought by the respondent against the appellants and tried before Bruce J. and a special jury. The application was made on the ground that there was no evidence in support of the findings of the jury, and that as well upon the facts proved as upon the findings of the jury the judge ought to have directed a verdict and judgment for the defendants. The facts are stated in the judgment of Lord Herschell L.C.

Pickford Q.C. (*Bigham* Q.C. with him) for the appellants:—

The conditions on the ticket formed part of the contract. The case is covered by *Burke* v. *South Eastern Railway* (2), where the plaintiff was held bound by the conditions in a book of coupons forming a railway ticket. The respondent relies on *Parker* v. *South Eastern Railway* (3), where the action was for damages for loss of articles deposited in a cloak-room. In the Court of Appeal Mellish and Baggallay L.JJ. thought there was no obligation to read the conditions on the ticket, whilst Bramwell L.J. held that there was. Bruce J. here left it to the jury, as in *Parker's Case* (3).

[LORD WATSON referred to *Henderson* v. *Stevenson* (4).]

That case was different inasmuch as the conditions were on the back, whereas in this instance they were on the face of the ticket and must have been seen. But even in *Burke* v. *South Eastern Railway* (2) Mellish L.J. points out on p. 422 that there are transactions in which a person would be bound by the conditions inscribed on a paper constituting a contract, even though he should not have read them. *Watkins* v. *Rymill* (1) is strongly in the appellants' favour, and decided that a plaintiff who delivered a wagonette for sale by the defendant was bound by the conditions on the receipt whether he read them or not. *Burke* v. *South Eastern Railway* (2) was carefully examined by the Court (Hawkins, Stephen and Watkin Williams, JJ.)

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(1) Not reported.

(2) 5 C. P. D. 1.

(3) 1 C. P. D. 618; 2 C. P. D. 416.

(4) Law Rep. 2 H. L., Sc. 470.

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Joseph Walton Q.C. and *Collingwood Hope* for the respondent were not heard.

LORD HERSCHELL L.C.:—

My Lords, the only question that arose on the trial of this action was whether the plaintiff was bound by certain conditions limiting the liability of the defendants, who had engaged to carry her on their steamer from Philadelphia to Liverpool. The plaintiff paid her passage-money and received a ticket from the defendants. On that ticket undoubtedly there were a great number of conditions detailed. The ticket began by stating that each passenger would be required to provide bedding and eating utensils, and then it continued: "It is mutually agreed for the consideration aforesaid that this ticket is issued and accepted upon the following conditions." Then follow a number of conditions, beginning under the letter (*a*) and going down to the letter (*i*); the condition in question was one under letter (*d*): "The company is not under any circumstances liable to an amount exceeding $100 for loss of or injury to the passenger or his luggage."

My Lords, three questions were left to the jury: "(1.) Did the plaintiff know that there was writing or printing on the ticket?" That question they answered in the affirmative. "(2.) Did she know that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage?" That they answered in the negative. "(3.) Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions?" That they answered in the negative also.

Now, those are questions which the majority of the Court of

(1) 10 Q. B. D. 178.

(2) 5 C. P. D. 1.

Appeal, in the case of *Parker* v. *South Eastern Railway Company* (1), pointed out, by their judgment, ought to be left to the jury. That was a case, in its broad features, very similar to this, inasmuch as the plaintiff there had deposited some luggage at the luggage office of one of the railway companies, and received in return for the deposit of the luggage a ticket on which there was printed "See back," and on the back were certain conditions by which it was sought to limit the liability of the company. The majority of the Court of Appeal held that they could not say, as matter of law, that by reason of taking that ticket in exchange for the goods the plaintiff was bound by the conditions; that there were questions to be determined by the jury, and that upon their determination would depend the liability of the defendants.

My Lords, the only question that now comes before this House is whether there was any evidence to go the jury upon which they could properly find the answer that they did to the last two questions. Now, what are the facts, and the only facts, bearing upon this question which were proved before the jury? That the plaintiff paid the money for her passage for the voyage in question, and that she received this ticket handed to her folded up by the ticket clerk, so that no writing was visible unless she opened and read it. There are no facts beyond those. Nothing was said to draw her attention to the fact that this ticket contained any conditions; and the argument of the appellants is, and must be, this, that where there are no facts beyond those which I have stated the defendants are entitled, as a matter of law, to say that the plaintiff is bound by those conditions. That, my Lords, seems to me to be absolutely in the teeth of the judgment of the Court of Appeal in the case of *Parker* v. *South Eastern Railway Company* (1), with which I entirely agree; nor does it seem to me consistent with the case of *Henderson* v. *Stevenson* (2) in your Lordships' House when that case is carefully considered.

I therefore move your Lordships that this appeal be dismissed with costs.

(1) 1 C. P. D. 618; 2 C. P. D. 416.

(2) Law Rep. 2 H. L., Sc. 470.

LORD WATSON :—

My Lords, I concur. It appears to me that there was ample material for a finding by the jury on all these three issues, and I am at present inclined to think that they found rightly upon them all.

LORD ASHBOURNE :—

My Lords, I also quite concur. The ticket in question in this case was for a steerage passenger—a class of people of the humblest description, many of whom have little education and some of them none. I think, having regard to the facts here, the smallness of the type in which the alleged conditions were printed, the absence of any calling of attention to the alleged conditions, and the stamping in red ink across them, there was quite sufficient evidence to justify the learned judge in letting the case go to the jury.

LORD MORRIS :—

My Lords, I concur.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 2nd March 1894.

Solicitors for appellants: *Rowcliffes, Rawle & Co. for Hill, Dickinson & Co., Liverpool.*

Solicitors for respondent: *Field, Roscoe & Co. for Bellringer & Cunliffe, Liverpool.*

[HOUSE OF LORDS.]

H. L. (E.)
1894
March 8.

JESSIE HEDLEY (PAUPER) . . . . . APPELLANT;

AND

THE PINKNEY & SONS STEAMSHIP COMPANY, LIMITED . . . . . RESPONDENTS.

Ship—Owner of Ship and Seaman, Contract between—Obligation of Owner under Merchant Shipping Act 1876 (39 *&* 40 *Vict. c.* 80) *s.* 5—"*Seaworthiness*"—*Negligence—Master and Servant—Negligence of Captain—Fellow Servant—Common Employment.*

A ship was sent to sea with stanchions and rails on board, but not shipped as they ought to have been so as to raise the bulwarks at a certain part to the proper height. A storm came on and a seaman engaged in performing his duty on deck fell overboard in consequence of the neglect to ship the stanchions and rails and was drowned. It was not safe for the crew that the ship should leave port with the stanchions and rails unshipped:—

Held, affirming the decision of the Court of Appeal ([1892] 1 Q. B. 58), that the representatives of the seaman had no claim for damages against the shipowners; for first, apart from statute, the doctrine of common employment applied and protected the owners from the consequences of the master's negligence: see *Wilson* v. *Merry* (Law Rep. 1 H. L., Sc. 326); and secondly, the neglect of duty on the part of the master did not render the ship "unseaworthy" within the meaning of sect. 5 of the Merchant Shipping Act 1876 (39 & 40 Vict. c. 80).

APPEAL from an order of the Court of Appeal (1).

The circumstances were as follows. Thomas Hedley was a seaman on board the steamship *Prodano* on a voyage from London to Cardiff. The bulwarks generally were about 4 ft. or 4 ft. 6 in. high; but abreast the hatchways, for the convenience of loading and unloading cargo, the permanent bulwarks were only 2 ft. or 2 ft. 6 in. high, and there were for the protection of the crew removeable stanchions and rails, made to fit into the bulwarks and to raise them to the general height when the hatchways were not in use. When the *Prodano* left London these stanchions and rails were on board but were not shipped. There was evidence that when the vessel left port it was usual

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(1) [1892] 1 Q. B. 58.

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COMPANY.

and proper to ship the stanchions and rails and that it was not safe for the crew that the ship should leave port without shipping them. During the voyage rough weather came on; Hedley was performing his duty on deck, the vessel gave a heavy lurch, and Hedley, having been thrown against the starboard bulwarks at the point where the stanchions and rails ought to have been but were not, fell overboard and was drowned. If the stanchions and rails had been shipped Hedley would not have fallen overboard. In fine weather they might have been shipped in about twenty minutes: but after the storm began it would not have been possible to ship them.

The appellant, as the widow and administratrix of Hedley, sued the respondents, as owners of the vessel, for negligence in not having the stanchions and rails properly shipped and placed and the bulwarks properly protected. At the trial before Grantham J. and a special jury the verdict was for the plaintiff for £175 and judgment was entered accordingly.

The Court of Appeal (Lord Esher M.R., Lopes and Kay L.JJ.) reversed these decisions and entered judgment for the defendants (1).

1893. July 31, Aug. 1. *Raikes* Q.C. (*Statham* with him) for the appellant:—

The appellant's case rests on two contentions: first, that the vessel was unseaworthy within the meaning of sects. 4 and 5 of the Merchant Shipping Act 1876; secondly, that the captain was negligent, and the doctrine of common employment does not apply to a master and his crew. Sect. 4 makes it a criminal offence to send an unseaworthy ship to sea and applies both to owner and master. Sect. 5 dealing with the civil liability applies to the owner, but makes him liable for the negligence of the master and of every agent charged with the sending of the ship to sea. "Unseaworthy" in sect. 5 must have the same meaning as in sect. 4, that is to say such a state "that the life of any person is likely to be thereby endangered."

The doctrine of common employment does not apply to a case like this. The master of a ship is not an ordinary servant—the very term implies the difference; and there are familiar incidents to the employment which are absolutely inconsistent with the doctrine. A seaman, for example, can recover his wages from the master; and the captain has a disciplinary power which also negatives the doctrine. He can put a seaman in irons for disobedience. *Ramsay* v. *Quinn* (1) is a direct decision that the captain of a merchant ship is not a fellow servant with the sailors, but the agent or representative of the owners who are responsible for the injury or death of a sailor caused by the captain's negligence.

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(1) [1892] 1 Q. B. 58.

[LORD HERSCHELL L.C. referred to *Murphy* v. *Smith* (2), cited in *Ramsay* v. *Quinn* (1).]

There was a breach of the duty imposed by the 5th section which is a continuing warranty that the vessel shall be seaworthy during the whole of the voyage. The vessel is not seaworthy so long as these stanchions and rails are not in their places. In *The Deeside* (3), Butt J. held that the smallness of the crew constituted unseaworthiness.

Finlay Q.C. and *Lennard* (*Cyril Dodd* Q.C. with them) for the respondents, were only heard on the question whether there had been a breach of the duty imposed by sect. 5:—

A ship is not unseaworthy where there has been only a failure to use appliances which were at hand for use. There may be negligence on somebody's part; but there is no defect of equipment. The object of the Act is to make the owner liable for not providing, not for the failure to use the proper equipment. To hold the respondents liable would involve making an owner responsible for loss or injury caused to every sailor by every act of negligence or carelessness on the part of the master. If the owner provides what is needed for each emergency, he has done his duty. The want of reasonable care applies to the loading and not to the navigation. The owner must see that the vessel is properly prepared for the voyage. Lord Blackburn's observations in *Steel* v. *State Line Steamship Company* (4), that where the thing can be set right in a few minutes there may be negligence, but cannot be unseaworthiness, are exactly in point. Unsafe and unseaworthy are not the same thing. For a definition of unseaworthiness see Phillips on Insurance, vol. i. s. 695.

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(1) 8 Ir. Rep. C. L. 322.

(2) 19 C. B. (N.S.) 361.

(3) Reported only in the Merchant Shipping Gazette of 1890.

(4) 3 App. Cas. 72, at pp. 90, 91.

Raikes Q.C. in reply.

The House took time for consideration.

1894. March 8. LORD HERSCHELL L.C.:—

My Lords, this action was brought against the respondents, who are the owners of the screw-steamer *Prodano*, by the plaintiff, the widow and administratrix of a seaman who was drowned whilst serving on board that vessel. The deceased was one of a crew of six hands engaged to take the vessel from London to Cardiff. The bulwarks of the vessel generally were 4 ft. to 4 ft. 6 in. in height, but opposite to the hatchways the permanent bulwarks were only 2 ft. to 2 ft. 6 in. high, there being stanchions and rails to put into these apertures so as to make the bulwarks of the same height throughout when the hatchways were not in use.

The vessel left London on the 8th of March 1891. At that time these stanchions and rails had not been fixed, but they were on board, and might during fine weather have been fixed at any time within about twenty minutes. The next day after leaving London the vessel met with bad weather in the English Channel, and began to roll heavily. The deceased whilst engaged in endeavouring to secure a tarpaulin over one of the hatches, lost his hold and footing, owing to a violent lurch of the vessel, and fell overboard through an opening in the bulwarks across which the rails had not been fixed. It was not possible to fix the stanchions and rails after the storm began, but there would have been no difficulty in doing so prior to that time.

The action was founded upon the alleged negligence of the master of the vessel in not seeing that the stanchions and rails were fixed in their places before the bad weather came on, and also upon an alleged breach of duty by the master to use all reasonable means to keep the vessel "in a seaworthy condition for the voyage during the same." The jury returned a verdict for the plaintiff for £175, for which sum judgment was entered by Grantham J. before whom the case was tried. The Court of Appeal set aside this judgment, and entered judgment for the defendants, upon the ground that there was no evidence to go to the jury of liability on their part.

Lord Herschell, L.C.

My Lords, it cannot be doubted that there was evidence of negligence on the part of the master of the vessel, but it is equally free from doubt that if he is to be regarded as the servant of the owner engaged in a common employment with the seaman who lost his life, liability does not, in the existing state of the law, attach to the respondents. It was argued that the master of a vessel, although in some respects the servant of the shipowner, possesses in relation to the crew powers and duties independent of him, and that the law which exempts a master from liability to his servant for the negligence of another servant engaged in a common employment with him did not apply in such a case.

The only authority cited for this proposition was a case of *Ramsay* v. *Quinn*, in the Court of Common Pleas (Ireland) (1). But in view of the judgment of this House in *Wilson* v. *Merry* (2), which was recently considered in the case of *Johnson* v. *Lindsay* (3), I do not think it is possible to give effect to the contention of the appellant.

The question arising on the appellant's claim under sect. 5 of the Merchant Shipping Act, 1876, is one of greater difficulty. That section imports into every contract of service between the owner of a ship and the seamen thereof an implied obligation upon the owner of the ship "that the owner of the ship and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same."

The question is, Was there evidence that this obligation had not been fulfilled? It is asserted on the part of the appellant

(1) 8 Ir. Rep. C. L. 322.
(2) Law Rep. 1 H. L., Sc. 326.
(3) [1891] A. C. 371.

that there was, on the ground that the apertures, which should have been closed by fixing the stanchions and rails, were left unclosed; that the vessel was consequently, at the time of the accident, unseaworthy; and that the master, having failed to see that the stanchions and rails were fixed, had not used all reasonable means to keep "her seaworthy for the voyage during the same."

My Lords, the case mainly turns in my opinion on the construction to be put upon the words "seaworthy for the voyage" in the connection in which they are found. The word "seaworthy" is a well-known term in shipping law, and has a perfectly definite and ascertained meaning. It is used to describe the condition in which a vessel insured under a voyage policy is bound to be on leaving port if the contract of insurance is to be effectual against the underwriter.

Baron Parke, in the case of *Dixon* v. *Sadler* (1), defined the seaworthiness of a vessel thus: "that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter ordinary perils of the voyage." Other definitions which have been given do not, I think, substantially differ from this, and I think when so well known a word is used in the statute of 1876 it must have its well-established meaning attached to it.

The question is then, Was the vessel unseaworthy in this sense at the time of the accident? It must be admitted that there was more danger to those engaged on board than if the moveable bulwark had been in its place; but did this render the vessel unseaworthy?

In the case of *Steel* v. *State Line Steamship Company* (2), which came before your Lordships' House, the question arose whether a vessel which started on her voyage with an insufficiently fastened port-hole, through which the sea burst, damaging the cargo, was in a seaworthy condition at the commencement of her voyage. Lord Blackburn expressed the opinion that if the port was in a place where it would be in practice left open from time to time, but was capable of being speedily shut if occasion required, the vessel could not be said

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(1) 5 M. & W. 405, 414.

(2) 3 App. Cas. 72.

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to be unfit to encounter the perils of the voyage; that if when bad weather threatened it was not shut, that would be negligence of the crew and not unseaworthiness of the ship.

My Lords, I entirely concur in this view. It is quite clear that if this view be correct, the *Prodano* was not unseaworthy at the time she left the port of London. After she left that port her hull and equipment remained precisely what they were at the time of her departure. She was in all respects efficiently equipped. The fault was in not making use of the equipment with which she had been furnished.

Under circumstances such as these, I do not think it can be said that there has been a failure to keep her in a seaworthy condition for the voyage, within the meaning of the enactment. Following, as it does, the obligation that the owner and the master, and every agent charged with the loading of the ship or the preparing thereof for sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage, I think the words "to keep her in a seaworthy condition for the voyage during the same," point to an obligation of the same character, and not to a neglect properly to use the appliances on board a vessel well equipped and furnished. There is ample scope for the operation of the words in question, even though this construction be put upon the enactment. If any of the necessary appliances were lost or destroyed in the course of the voyage, it would, no doubt, be the duty of the master to use all reasonable means to supply others in their place, just as it might be his duty during the voyage to restore the hull or machinery, if damaged, to a condition suited to the perils to be encountered. But if the appellant's argument were to prevail, it would have a much wider scope than I am able to gather from the words of the enactment was intended by the legislature.

The failure properly to secure many parts of the ship which are in ordinary practice open, from time to time, would no doubt diminish the safety of those serving on board her, and be a source of danger to them; but I do not think it could reasonably be said that because in such a case a bolt was not securely fixed the vessel thereupon became unseaworthy.

In truth, the point is only of importance because of the

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limitation which the law at present imposes upon the liability of an employer for accidents due to the negligence of his servants; but for this limitation, I do not think it would have occurred to any one to maintain that there had been, in the present case, a breach of the implied obligation created by sect. 5 of the Merchant Shipping Act 1876.

For these reasons, I am of opinion that the judgment of the Court of Appeal ought to be affirmed, and the appeal dismissed.

LORD WATSON:—

My Lords, in this appeal I have come to the same conclusion on all points with the Lord Chancellor. I have only to add that I fully concur in all the reasons which have been assigned for his judgment by my noble and learned friend.

LORD MACNAGHTEN:—

My Lords, I also concur.

Order appealed from affirmed and appeal dismissed.

Lords' Journals 8th March 1894.

Solicitor for appellant: *S. Pilley for James Storey, Sunderland.*

Solicitors for respondents: *Downing, Holman & Co. for Pinkney & Bolam, Sunderland.*

[HOUSE OF LORDS.]

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THE GUARDIANS OF THE POOR OF THE WEST HAM UNION . . . . } APPELLANTS;

AND

THE CHURCHWARDENS, OVERSEERS AND GUARDIANS OF THE POOR OF ST. MATTHEW, BETHNAL GREEN . } RESPONDENTS.

Poor Law—Settlement—Residence while under Sixteen apart from Parent—Irremoveability—9 & 10 *Vict. c.* 66, *s.* 1—11 & 12 *Vict. c.* 111, *s.* 1—*Divided Parishes and Poor Law Amendment Act,* 1876 (39 & 40 *Vict. c.* 61) *s.* 34.

A pauper, nearly fourteen years old, went into domestic service in the parish of L. in the West Ham Union, remained there nearly four years, left before she became eighteen and resided outside that union with her mother. The pauper's father died when she was two years old. The widowed mother never resided in or acquired a status of irremoveability from or a settlement in that union:—

Held, reversing the decisions of the Queen's Bench Division and the Court of Appeal ([1892] 2 Q. B. 65, 676), that upon the true construction of 9 & 10 Vict. c. 66, s. 1, and 11 & 12 Vict. c. 111, s. 1, and the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34, the pauper had not resided for the term of three years in the parish of L. in such manner and under such circumstances in each of such years as would in accordance with the statutes in that behalf render her irremoveable, and that she had not therefore acquired a settlement in the West Ham Union.

Reg. v. *Leeds Union* (4 Q. B. D. 323) disapproved.

APPEAL from an order of the Court of Appeal upon a special case stated by Quarter Sessions (1).

The question raised by the appeal was whether Caroline Batchellier acquired a legal settlement in the West Ham Union, and was therefore properly ordered to be removed thither from the parish of St. Matthew, Bethnal Green.

In 1879 the pauper, a few days before she attained the age of fourteen, went into domestic service in the parish of Low Leyton in the West Ham Union. She remained there nearly four years, and left before she became eighteen years of age. After that time she resided for the most part with her widowed mother, but was occasionally in service at places outside the West Ham Union. The widowed mother of the pauper never resided in or acquired a status of irremoveability from or a settlement in the West Ham Union. The father died when the pauper was two years old.

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(1) [1892] 2 Q. B. 65, 676.

The Queen's Bench Division (Pollock B. and Vaughan Williams J.) held that the last legal settlement of the pauper was in Low Leyton, and this decision was affirmed by the Court of Appeal (Lord Esher M.R., Bowen and Kay L.JJ.) (1).

1893. Dec. 1, 5. *Jelf* Q.C. and *R. Cunningham Glen* for the appellants:—

The Court of Appeal followed *Reg.* v. *Leeds Union* (2) which instead of following the actual words of the proviso in 9 & 10 Vict. c. 66, s. 1, and the substituted proviso 11 & 12 Vict. c. 111, sought to carry out the object, viz. the prevention of the separation of families, which the Legislature was thought to have intended. That case was wrongly decided. *Reg.* v. *Elvet* (3) which was said to be in the respondents' favour is inapplicable, because both father and mother were dead and there was nothing to which the proviso could attach. Lord Esher M.R. has confused irremoveability with settlement, whereas the two are quite distinct. The test of irremoveability is not residence, but status. When a child is in service or at school it has no status apart from its parents: *Reg.* v. *Abingdon* (4). The removeability of an unemancipated child depends on that of its parents: *Reg.* v. *St. Mary Arches, Exeter* (5) of which Bowen L.J. has misconceived the effect: *Mitford* v. *Wayland Union* (6). A settlement can no doubt be acquired by a residence in part before the age of emancipation which the Divided Parishes Act for the first time fixed at sixteen, and in part after that age as in *Highworth and Swindon Union* v. *Westbury-on-Severn Union* (7). But the residence there was throughout with the mother and not, as here, away from the child's parents. The decision in *Reg.*

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(1) [1892] 2 Q. B. 65, 676.
(2) 4 Q. B. D. 323.
(3) 2 E. & E. 266.
(4) Law Rep. 5 Q. B. 406.
(5) 1 B. & S. 890.
(6) 25 Q. B. D. 164.
(7) 14 App. Cas. 465.

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v. *Leeds Union* (1) has no doubt been followed in many cases on the principle of authority, not of reason; but before that case many cases had been decided the other way and wholly in the appellants' favour: *Reg.* v. *St. Ebbe's* (2); *Reg.* v. *Pott-Shrigley* (3); *Reg.* v. *Llanelly* (4); *Reg.* v. *Much Hoole* (5); *Reg.* v. *Stapleton* (6); *Reg.* v. *St. Ann, Blackfriars* (7); *Reg.* v. *East Stonehouse* (8); *Reg.* v. *East Stonehouse* (9); *Reg.* v. *Combs* (10); *Reg.* v. *Norwood* (11); *Reg.* v. *Kingston* (12); *Reg.* v. *St. George-in-the-East* (13); *Reg.* v. *St. Olave's* (14). And since 1876: *Dorchester* v. *Weymouth* (15); *Reigate* v. *Croydon* (16); *Medway* v. *Bedminster* (17); *Manchester* v. *Ormskirk* (18).

Beven and *Crossfield* for the respondents:—

The governing principle is settlement and not irremoveability. It is not accurate to describe irremoveability as a status. Settlement is a status and irremoveability is one of its incidents. No doubt where there is no permanent separation between child and parents, the former cannot either before or after the age of sixteen acquire a settlement of its own. But before the Divided Parishes Act which fixed that age as the period of emancipation a child could gain a settlement independently of parents. A settlement was so acquired in *Rex* v. *Inhabitants of Bleasby* (19) by a year's service, and in *Rex* v. *Inhabitants of Wilmington* (20) where the circumstances excluded parental control. Notwithstanding the legislative limit of sixteen, hiring and service before that age may still be the basis of irremoveability though incapable of giving a settlement. The test is the existence or absence of the animus revertendi. There was no such animus here; the child was permanently away. Ever since the Divided Parishes Act a child may gain a separate settlement:

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(1) 4 Q. B. D. 323.
(2) 12 Q. B. 137.
(3) 12 Q. B. 143.
(4) 17 Q. B. 40.
(5) 17 Q. B. 548.
(6) 1 E. & B. 766.
(7) 2 E. & B. 440.
(8) 3 E. & B. 596.
(9) 4 E. & B. 901.
(10) 5 E. & B. 892.
(11) Law Rep. 2 Q. B. 457.
(12) 21 L. T. (N.S.) 488.
(13) Law Rep. 5 Q. B. 364.
(14) Law Rep. 9 Q. B. 38.
(15) 16 Q. B. D. 31.
(16) 14 App. Cas. 465.
(17) 14 App. Cas. 465.
(18) 16 Q. B. D. 723.
(19) 3 B. & Ald. 377.
(20) 5 B. & Ald. 525.

Guardians of Salford v. *Overseers of Manchester* (1); *Guardians of Holborn* v. *Guardians of Chertsey* (2). So in apprenticeships: 3 & 4 Wm. & M. c. 11, s. 7, made service constitute a settlement. The animus revertendi was held to be the test by Patteson J. in *Reg.* v. *Llanelly* (3). So in *Reg.* v. *Hendon* (4). Sect. 35 of the Divided Parishes Act deals with derivative settlements only. This case is governed by *Reg.* v. *Leeds Union* (5) which was rightly decided and has been followed in many subsequent cases.

Jelf Q.C. in reply.

The House took time for consideration.

1894. March 20. LORD HERSCHELL L.C. (after stating the facts):—

My Lords, it is argued for the respondents, and this contention has been sustained both by the Divisional Court and the Court of Appeal, that the pauper acquired a settlement in the appellant union by virtue of her residence in Low Leyton for a period exceeding three years. That contention is founded on the 34th section of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), which is as follows: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremoveable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise: Provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or Court think sufficient."

It is to be observed that a settlement is not acquired under this section by the mere fact of residence; it must be residence in such manner and under such circumstances in each of the three years as would, in accordance with the statutes in that behalf, render the person irremoveable. It is necessary, therefore, to ascertain what are the statutory conditions of irremoveability, and then to inquire whether they were satisfied in each year of the pauper's residence.

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(1) 10 Q. B. D. 172.

(2) 14 Q. B. D. 289.

(3) 17 Q. B. 40.

(4) 32 L. J. (M.C.) 202.

(5) 4 Q. B. D. 323.

Before referring to these statutes it is as well to note that by sect. 35 of the Divided Parishes Act it is provided that a child under the age of sixteen shall take the settlement of its father or of its widowed mother, and shall retain the settlement so taken until it shall acquire another.

The earliest of the statutes creating the status of irremoveability, as distinguished from a settlement, was 9 & 10 Vict. c. 66. By the 1st section of this Act it is enacted that "no person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years next before the application for the warrant." At the end of the section there is a proviso in these terms: "Provided always, that whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removeable whenever he or she is removeable, and shall not be removeable when he or she is not removeable." By 24 & 25 Vict. c. 55, s. 1, the term of residence necessary for irremoveability was reduced to three years, and by 28 & 29 Vict. c. 79, s. 8, to one year.

But for the proviso at the end of the 1st section of 9 & 10 Vict. c. 66 the case would be free from any difficulty, the conditions of irremoveability would clearly have been complied with, and the pauper's settlement in West Ham would have been made out.

The question turns upon the construction and effect of that proviso, or rather of the proviso substituted for it by 11 & 12 Vict. c. 111, s. 1, which is in these terms: "Provided always, that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removeable from any parish or place from which he or she would be removeable, notwithstanding any provisions of the said recited Act, and should not be removeable from any parish or place from which he or she would not be removeable by reason of any provision in the said recited Act."

The whole difference between this proviso and that for which it is substituted is that the repealed proviso made the wife and children removeable from any parish from which the husband or parent *is* removeable, and not removeable from a parish from which the husband or parent is not removeable. The substituted proviso makes the test whether the husband or parent *would* or *would not be* removeable from the parish. Whatever the reason for the change the later statute makes it quite clear that the test is not the removal but the removeability of the husband or parent.

It is contended for the appellants that by virtue of this proviso the pauper did not reside for three years at Low Leyton in such a manner and under such circumstances during each of the three years as to render her irremoveable. During the first two years of her residence she was under sixteen years of age. Her settlement was that of her mother, who never resided in the West Ham Union and would have been removeable from the union. It is said, therefore, that, notwithstanding the enactment in the earlier part of the first section of 9 & 10 Vict. c. 66, the daughter was also removeable thence.

The Courts below have held this contention not well founded. In their view the proviso is inapplicable to such a case as that now before the House. The Court of Appeal proceeded mainly —indeed, almost entirely—upon the limitation which it was said the decision of the Divisional Court of Queen's Bench in the case of *Reg.* v. *Leeds Union* (1) had placed upon this proviso, namely, that it was only intended to prevent the separation of families, and that where there was no question of such separation the proviso was inapplicable. Kay L.J., though he did not dissent from the rest of the Court, thought the question a doubtful one. Bowen L.J. did not express any opinion whether the judgment in *Reg.* v. *Leeds Union* (1) was right or not, but said that he was unwilling to disturb the law there laid down, which had been acted upon for fourteen years.

My Lords, if no other construction than that adopted in *Reg.* v. *Leeds Union* (1) had been put by the Courts upon the proviso in question, I, too, might have been unwilling to disturb it; but after careful consideration it appears to me that the decision in

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(1) 4 Q. B. D. 323.

Reg. v. *Leeds Union* (1) is in direct conflict with several earlier authorities.

In *Reg.* v. *St. Ebbe's* (2) it was held that the proviso to the first section of 9 & 10 Vict. c. 66 refers to the case of a person being legally removeable, and not to his being in fact removeable or not by reason of his presence in the parish or absence from it.

In *Reg.* v. *Pott-Shrigley* (3) the pauper had resided with her husband nearly five years in a parish when he was committed to prison out of it for felony, and afterwards transported. The wife continued to reside in the same parish until her residence there exceeded the period of five years. An order was made for her removal. It was held that the pauper was removeable. "The effect of the proviso," said Lord Denman, "whether we look to the statute 11 & 12 Vict. c. 111 or not, appears to us to be that the wife is removeable if, under the circumstances, the husband having come to her and become chargeable, would have been removeable." It seems obvious that in this case the question whether the removal would operate to separate husband and wife was regarded as immaterial. She was already separated from her husband; he had left the parish where she had, in fact, resided for more than five years, and was still residing at the time of the order of removal.

Again, in *Reg.* v. *Llanelly* (4), a married woman and her children were removed from a parish where she had resided as a married woman for ten years; her husband had left her two years previously, and gone to America. No animus revertendi being shewn, it was held that there had been a disruption of the husband's residence, and that he was not resident in the respondent parish. Lord Campbell said: "If he is not resident himself, it is impossible to contend that the wife has, by her own residence, acquired a right of irremoveability."

In *Reg.* v. *Manchester* (5), reported in a note to the last case, the pauper had lived five years in a parish not that of her settlement, when she became chargeable and an order of removal was made. Her husband had left her before the five years had

(1) 4 Q. B. D. 323.
(2) 12 Q. B. 137.
(3) 12 Q. B. 143.
(4) 17 Q. B. 40.
(5) 17 Q. B. 46, n.

expired and gone to America without an animus revertendi. Before the order of removal was made he died. It was held that the pauper was not irremoveable.

In *Reg.* v. *Much Hoole* (1) an Irishman with no English settlement married a woman whose settlement was in A., and lived with her for more than five years in B. He then deserted her and left the kingdom. It was held that the wife was removeable from B. to the place of her settlement.

My Lords, there are several other cases to the same effect to which I do not think it necessary to refer in detail; but it may be well to call attention to one other decision of a somewhat later period.

In the case of *Reg.* v. *Guardians of St. Olave's Union* (2) the pauper had resided in service in the respondent union for a little more than two years. During that time she had gained her own living entirely independent of her mother. The pauper had the same settlement as her mother, having never gained a settlement in her own right. The question was whether, by her residence in service and apart from her mother for two years in the respondent union, the pauper had acquired a status of irremoveability in that union. It turned entirely upon the construction of the proviso which has to be construed in the present case. The Court held that the proviso applied and that, inasmuch as the mother would have been removeable from the respondent union, the pauper herself was.

I find it difficult to reconcile this decision with that which is now under review by your Lordships. The facts bearing upon the question whether residence in service apart from the mother in a parish from which the mother would have been removeable enabled the child to acquire a status of removeability appear to me to be identical.

In none of the cases prior to *Reg.* v. *Leeds Union* (3) (to which I will refer immediately) do I find any suggestion that inquiry ought to be made whether an order of removal would effect a separation between a child and its parent or a wife and her husband, nor do I find that circumstance treated as material.

(1) 17 Q. B. 548.

(2) Law Rep. 9 Q. B. 38.

(3) 4 Q. B. D. 323.

It seems to me that if it be material some of the decisions ought to have been the other way.

The case of *Reg.* v. *Elvet* (1) was much relied on by the learned counsel for the respondents; but I do not think it is at all inconsistent with the other cases to which I have referred. In that case the pauper had resided with her father in E. from her birth in 1844 until her father's death in 1857. After his death the pauper remained there till the following year, when she became chargeable, and an order was made for her removal. At this time the mother also was dead. It was contended that the father's status of irremoveability was taken away by the receipt of relief through his wife, and that, therefore, the pauper was removeable. The Court held that this was not so, inasmuch as the father had acquired a status of irremoveability from E., which was not lost by the subsequent receipt of relief. As he, therefore, would not have been removeable, there was nothing in the proviso to prevent the substantive enactment applying to the pauper, and to make her removeable notwithstanding her residence in the parish for more than the statutory period.

My Lords, I pass now to the case of *Reg.* v. *Leeds Union* (2). The pauper was the illegitimate child of a single woman, and was born in the parish of R. When the child was a fortnight old, it was placed by its mother in the care of a man and his wife, who resided with it for six years in the parish of S. No evidence was given of the settlement by birth or otherwise of the mother of the pauper, though evidence was given that the respondent Union had made unsuccessful inquiries about it. The Court, consisting of Cockburn L.C.J. and Lopes J., held that the pauper had acquired a settlement in S. by reason of the provisions of 39 & 40 Vict. c. 61, s. 34. The Lord Chief Justice said: "It has been argued that the proviso in 9 & 10 Vict. c. 66, s. 1 (as explained in 11 & 12 Vict. c. 111, s. 1) goes to shew that a child is irremoveable only where the parent is irremoveable; and that, therefore, the three years' residence, under 39 & 40 Vict. c. 61, s. 34, ought not to give it a settlement distinct from that of its mother. But the proviso in question has really nothing to do with the case before us. It was enacted to prevent the

(1) 2 E. & E. 266.

(2) 4 Q. B. D. 323.

dispersing of different members of a family. Here there is no question of separating the child from its parent, and we have simply to consider sect. 34 by itself. The child has actually resided for three years in Seacroft; but it is contended that because the mother lived in another parish the child constructively resided with her, and where she resided. It is true that where a child is under the authority and control of its parent, it may, even when placed at a school in a different parish, be said to constructively reside with the parent. Here, however, the child had been entirely given up by its mother; it was not a suspension, but a virtual abandonment of the maternal right."

Much stress appears to have been laid in this case upon the argument that the child was to be regarded as constructively residing with her mother, and that therefore she had not resided three years in the parish of Seacroft within the meaning of the statute. It is to this argument with reference to residence that the greater part of the judgment of the Lord Chief Justice is addressed. The proviso which has to be construed is put aside as having nothing to do with the case then before the Court, on the ground apparently that there was there no question of separating the child from the mother. None of the numerous previous cases in which the proviso had been considered and construed were cited in the argument, and there was consequently no attempt made to distinguish them.

It may be quite true, and probably is, that the object of the proviso was to prevent the separation of husband and wife or children and parent; but there is nothing in its language to limit its application to those cases where if it were not applied such a separation would be effected. It lays down, as I read it, a test perfectly easy of application—namely, whether the parent or husband would have been removeable; if so, the children and wife are removeable likewise, and, as far as I can see, that test is to be applied in all cases.

It is one thing to come to the conclusion that the Legislature had a certain object in laying down a particular rule. It is quite another to confine the rule in the manner suggested, where no such words of limitation are to be found in the enactment itself.

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To my mind the authority of *Reg.* v. *Leeds Union* (1) is much diminished by the fact that the previous decisions were not brought to the attention of the Court or dealt with by them.

Looking at the section apart from authority, I cannot myself feel justified in importing into the enactment a condition which is not to be found there. It is impossible to have in view all the various cases that might arise, and I am by no means sure that by adopting the rule which was laid down in *Reg.* v. *Leeds Union* (1), and which has been followed in the present case, we might not in some cases defeat the suggested intention of the Legislature.

Although we were informed by the learned counsel for the appellants that the authorities I have referred to, or some of them, were cited in the Court of Appeal, I doubt whether they were brought home to the minds of the learned judges, inasmuch as no attempt is made in the judgment below to distinguish them from or reconcile them with *Reg.* v. *Leeds Union* (1).

My Lords, for these reasons I think the judgment of the Court below ought to be reversed, and judgment given for the appellants. The respondents must bear the costs, both here and in the Courts below (2).

LORD HALSBURY :—

My Lords, I believe no question would have arisen in this case but for the supposed application of the decision in *Reg.* v. *Leeds Union* (1). I think that decision was wrong and ought not to be followed; but I think the decision, or at least the ground upon which the learned judges based it, would have no application to the case before your Lordships. Both the learned judges seem to have treated the question as depending upon what they call the constructive residence of a child with its parent while in fact being at a school with the authority of the parent. The Chief Justice adds a reply to an argument which I think could hardly have been used by Mr. Poland, that in order to make the status of irremoveability the child must have chosen its own residence. Certainly no such provision is to be found in the statute, and no such observations are applicable here. If it were to depend upon any such principle I should agree with that decision.

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(1) 4 Q. B. D. 323.

(2) See note at the end of this report.

It cannot be doubted that during two years of the residence which is relied on as making the pauper irremoveable the parent of the pauper was removeable; and therefore it seems to me impossible to contend, having regard to the plain words of the statute, that the child under sixteen was not removeable also, and if so the child had not acquired the status of irremoveability. With all respect to the learned judges who decided that case of *Reg.* v. *Leeds Union* (1) it appears to have been decided under two misapprehensions or serious errors in the reasoning. One was in supposing that the constructive residence with the parent had anything to do with the question before the Court. It had nothing whatever to do with it. The question was as to the status of irremoveability of a child under sixteen as involved in the removeability or irremoveability of the parent. Another error was in supposing that the language of the proviso can be construed in reference to the supposed policy of the enactment to prevent the separation of families. Now it is to be observed that the separation of families is undoubtedly one of the objects which the statute sought to prevent, but it apparently was not brought to the attention of the Court that that object was effected by a specific provision. That provision (9 & 10 Vict. c. 66, s. 3) is as follows: "And be it enacted, That no child under the age of sixteen years, whether legitimate or illegitimate, residing in any parish with his or her father or mother, stepfather or stepmother, or reputed father, shall be removed, nor shall any warrant be granted for the removal of such child from such parish in any case where such father, mother, stepfather, stepmother, or reputed father may not lawfully be removed from such parish."

Now, my Lords, to construe the language of the proviso contrary to the natural interpretation of the words with reference to some supposed policy of the Act where the Act itself has provided for the specific case, appears to me to be absolutely inadmissible. The real truth is that the child was removeable, not by reason of any residence or constructive residence, but because the child was the child of its parent. That is the natural interpretation of the statute, and I can find no words whatever which would cut down the operation of that enactment. The proviso can hardly be construed as intended to do what by substantive enactment had already been done; but it is clear, from an observation made by Cockburn C.J. and reported in the *Law Journal* (1), though not in the LAW REPORTS, that that was one of the grounds of his decision. It seems to me, therefore, that the decision now appealed from was based on a case which to me is manifestly wrong, and I think it ought to be reversed.

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(1) 4 Q. B. D. 323.

LORD ASHBOURNE:—

My Lords, I have had an opportunity of reading and fully considering the opinion which has just been delivered by my noble and learned friend on the Woolsack, and I entirely concur in it, and do not think I can usefully add anything.

LORD MORRIS:—

My Lords, I concur.

Order appealed from reversed and judgment entered for the appellants, the respondents to pay the costs here and in the Courts below: cause remitted to the Queen's Bench Division (2).

Lords' Journals 20th March 1894.

Solicitor for appellants: *F. E. Hilleary.*
Solicitor for respondents: *W. T. Howard.*

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(1) 48 L. J. (N.S.) M. C. 129.

(2) On the 8th of June, 1894, the question was raised before the Appeal Committee (Lord Herschell L.C. and Lords Watson, Ashbourne, Morris and Shand) whether this House had power to make any order as to costs. The Committee, without expressing any opinion as to the power, declined to alter the terms of the order as to costs, Lord Herschell L.C. saying that the matter ought to have been mentioned when judgment was pronounced, and that if it turned out that per incuriam costs had been given when there was no power to give them or to enforce them they would not be enforced.

[PRIVY COUNCIL.]

WEST INDIA IMPROVEMENT COMPANY DEFENDANT;

AND

THE ATTORNEY-GENERAL OF JAMAICA AND FRASER . . . . PLAINTIFFS.

J. C.*
1893
Nov. 28;
Dec. 16.

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

Law of Jamaica—Law 12 *of* 1889, *ss.* 20, 29—*Compensation—Accommodation Works—Power of Statutory Officer to bind the Company.*

Where by a local Act the promoters of a railway company were authorized to take lands for the purposes of their undertaking to be acquired by them through a Government officer appointed under sect. 20, compensation being payable by the Government, and the owners of the lands being entitled by sect. 29 to such accommodation works as may be fixed by agreement at the time when the amount of compensation is being settled:—

Held, that the statutory duty of conducting the assessment of compensation having been entrusted to such Government officer, the making of agreements for accommodation works was also within the scope of his authority, and he could within reasonable limits bind the company thereby, although the statutory duty of defraying the costs thereof was imposed upon the company.

APPEAL from an order of the Supreme Court (March 6, 1893), made upon a special case.

The question decided was whether on the true construction of Law 12 of 1889, and the agreement scheduled thereto, the respondent Fraser as a statutory officer appointed by the Government had power to bind the appellant by agreements with owners of land taken for railway construction to provide accommodation works for their benefit at the cost of the appellant.

Finlay, Q.C., and *Swinfen Eady*, Q.C., for the Appellant.

The Solicitor-General (Sir *J. Rigby*), and *Jenkins*, for the respondent.

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* *Present:*—LORD WATSON, LORD MACNAGHTEN, LORD SHAND, and SIR RICHARD COUCH.

J. C.
1893

West India Improvement Company v. Attorney-General of Jamaica and Fraser.

1893. Dec. 16. The judgment of their Lordships was delivered by

LORD WATSON:—

An Act was passed in June, 1889, by the Governor and Legislative Council of Jamaica, confirming a provisional agreement for the purchase of the Jamaica Railway, which was the property of the Government, by a company to be incorporated for that purpose, and also for the construction of certain extensions of the railway by persons described as "the promoters." Sect. 10 authorizes the promoters to construct these extensions, in accordance with plans and sections to be approved by the Director of Public Works; and subject to the provisions of sects. 20 and 23, to take and use the land requisite for that purpose, upon making full compensation for its value, and for all damage sustained by reason of the exercise of the powers vested in them. The same clause enacts that the amount of compensation is to be ascertained in the manner provided by the "Lands Clauses Law, 1872," which, with the exception of eight sections, is incorporated with the Act.

By the 37th article of the agreement it is stipulated that "the Government shall provide the track for the said extensions, except through the limits of Kingston, Montego Bay, and Port Antonio." Outside of these limits, whilst the power to take lands for the purposes of their undertaking is by the Act vested in the promoters, the obligation to pay full compensation is made incumbent, not upon them, but upon the Government. But the Act does not authorize the promoters themselves to conduct the proceedings for ascertainment of the amount of compensation payable; and that circumstance has led to the present litigation.

Sect. 20 enacts that "the Director of Public Works, or some other person appointed by the Governor in that behalf, shall, on behalf and in name of the promoters, acquire for the promoters such lands, not less in width than thirty feet in excess of what is actually required for any cutting or embankment, as may be required for laying the track of, and building the stations, sidings and workshops necessary for the said railway." It also enacts that the cost of such lands, and of acquiring the same shall be paid, on the warrant of the Governor, out of the general revenues of the island.

Sect. 29 enacts, inter alia, that "the promoters shall cause fences to be erected and maintained on each side of the railway, with such accommodation bridges, level crossings, and other works, as may be fixed by agreement with the owners of lands at the time when the amount of compensation to which they may be entitled is being settled under the Lands Clauses Law, 1872." It is plain that the Legislature did not contemplate that the extent of the accommodation works to which an owner was entitled should be fixed at any other time or in any other way; because the clause proceeds to enact that, if an owner of land adjoining the railway shall at any time require accommodation works, "beyond those fixed by agreement as aforesaid" he can only obtain them upon complying with certain conditions, one of which is "his entering into good and sufficient agreement to pay the entire cost of such work and of its maintenance."

The appellant company are "the promoters" within the meaning of the Act. The respondents are the Attorney-General, as representing the Government of Jamaica, and Philip Affleck Fraser, who is the person appointed by the Governor, in terms of sect. 20, to acquire lands on behalf of the promoters. The parties having differed as to the extent of Mr. Fraser's statutory powers, and other matters, the respondents brought this suit before the Supreme Court of the Colony, for a declaration to the effect that it is the duty of the appellant company, at their own expense, to execute and maintain such reasonable accommodation bridges, level crossings, and other works as may be fixed by agreement between Philip Affleck Fraser, as the person appointed as aforesaid, and the several owners of the lands acquired by him for the company, at the time when the compensation to which they may be entitled is being settled under the Lands Clauses Law, 1872.

The parties adjusted a special case for the opinion of the Court, the questions submitted being these:—

"(1.) Is the director of public works, or the plaintiff Philip Affleck Fraser, or any other person appointed under sect. 20 of the Jamaica Railway Company's Law, 1889, entitled to bind the defendants by any such agreement as that mentioned in paragraph 5 of this case?

"(2.) If the answer to the first question is in the affirmative, is the director of public works, or the plaintiff Philip Affleck Fraser, or any other person appointed under sect. 20 aforesaid, entitled so to bind the defendants if the said agreement is made either (*a*) without their consent or (*b*) contrary to their express orders?

"(3.) If either of the preceding questions is answered in the affirmative, is the cost of constructing and maintaining such bridges, level-crossings, and other accommodation works to be borne by the defendants?"

It was agreed, that if these questions were answered in the affirmative, the present respondents should have judgment with costs, and that the appellants should have judgment with costs if any one or more of them was answered in the negative.

The case was heard before Sir A. G. Ellis, C.J., Northcote, J., and Lumb, J., who answered all three questions in the affirmative, and entered judgment for the respondents accordingly.

Their Lordships have come without difficulty to the same conclusion as the learned judges. The terms of sect. 20 appear to them to indicate that the person charged with the statutory duty of conducting the assessment of compensation to land-owners on behalf of the promoters was to be an independent official, entitled and bound to exercise his own discretion in all matters committed to him, and not a mere agent acting under the orders of the promoters. It is not easy to understand what object could be gained by making such an appointment, if the appointee was to be subject, in all his proceedings, to the control of the promoters. The fact that the Government had a material interest, whereas the promoters had none, in reducing the amount of compensation awarded to land-owners, may account for the enactment of sect. 20.

The appellant company did not in the argument stated for them in the special case, or in their argument upon this appeal, assert any right to interfere with Mr. Fraser in his conduct of the proceedings under the Lands Clauses Law. They maintained, however, that the making of agreements in regard to accommodation works with land-owners was beyond the scope of these proceedings, and of his statutory authority. It is certainly true that such works do not constitute compensation within the meaning of the statutes, although they are an important factor in ascertaining the amount of compensation payable. But the enactments of sect. 29, taken in connection with the other provisions of the Act with reference to accommodation works, are, in the opinion of their Lordships, sufficient to shew that the making of these agreements was intended to be a step in the proceedings towards assessment of compensation, and to form part of the duty committed to the official appointed under sect. 20.

The main argument for the appellants upon this part of the case proceeded on the assumption that the official in question had power to treat with land-owners for the execution of accommodation works, and their claim to control him in the exercise of that power was founded upon the fact that in settling the extent of accommodation works their interest was directly opposed to that of the Government. The construction of suitable works would necessarily tend to obviate damage for which compensation would otherwise be payable; but that circumstance cannot justify a Court of law in straining the language of the Act, so as to give the appellants a right of control contrary to its natural interpretation. Their Lordships see no reason to suppose that the legislature doubted, or had occasion to doubt, that the statutory official would perform the duty entrusted to him fairly and reasonably towards the appellants as well as towards the Government. There is no need to discuss the precise limit of his power in this case, because the respondents admit that the appellants are only bound to execute such accommodation works as are not in excess of what may be reasonably necessary to enable land-owners whose lands are severed to continue working the property in manner accustomed, subject to no greater inconvenience than is necessarily occasioned by its severance; and the decree which they have obtained is limited to reasonable works.

These observations exhaust the first and second questions submitted in the special case. The third question presents an alternative. If the statutory official shall be held to have power to enter into agreements for accommodation works without the consent and contrary to the express order of the appellants, they contend that the cost of constructing and maintaining such works must be borne by the Government. Their argument in support of that contention appeared to be based, not upon the construction of the Act of 1889, but upon a vague theory that the Court ought to give them equitable relief against the prejudice which they may sustain in cases where an excessive amount of accommodation is conceded by agreement.

By the 7th article of the agreement, the promoters undertook to construct the extended railway "in accordance with the specification" contained in schedule I. thereto. Schedule I., which is also incorporated with the Act, specifies, as part of the railway works which they were thus bound to execute, "such accommodation gates and other works as shall be stipulated for in the conveyance of land, or may be required by law." It was conceded that there is no common law requiring the construction of such works, and that no provision is made with regard to them by the incorporated clauses of the Lands Clauses Law, 1872. Sect. 29 of the Act of 1889 expressly provides that accommodation works, when fixed by agreement, shall be erected and maintained by the promoters. Their Lordships need hardly observe that, when the Legislature imposes upon the promoters of a railway or other undertaking an obligation to construct and maintain works, it necessarily follows that they must bear the cost of construction and maintenance, unless there be an express or plainly implied provision to the contrary. In this case no such provision is to be found.

For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The appellants must pay the costs of this appeal.

Solicitors for appellant: *Freshfields & Williams.*

Solicitors for respondents: *Shaen, Roscoe, Massey & Co.*

[PRIVY COUNCIL.]

J. C.*
1894
April 24.

COUNCIL OF THE MUNICIPALITY OF BRISBANE . . . . DEFENDANT;

AND

MARTIN . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Order for New Trial reversed—Verdict—Conflict of Evidence.

In an action for damages owing to the negligent construction of a drain, the jury found that there was no negligence, but the Full Court set aside the verdict and ordered a new trial:—

Held, that this order must be discharged. There being evidence both ways, the verdict was one which the jury, viewing the whole of the evidence, could reasonably find.

APPEAL from an order of the Supreme Court (Dec. 8, 1892), setting aside a verdict in favour of the appellant and directing a new trial.

The facts are stated in the judgment of their Lordships.

Finlay, Q.C., and *Bremner*, for the appellant, contended that the above order was wrong. The question of negligence was for the jury; the evidence as to negligence was conflicting; the verdict such as reasonable men could find, even if it were not such as approved itself to the Court. Upon the question of the liability of a public corporation for negligence or non-feasance reference was made to *Municipality of Pictou* v. *Geldert* (1).

The respondent did not appear.

The judgment of their Lordships was delivered by

LORD ASHBOURNE:—

The respondent, who was the plaintiff in this case, is a hansom-cab proprietor. He commenced an action in the Supreme

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* *Present*:—LORD HOBHOUSE, LORD ASHBOURNE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

(1) [1893] A. C. 524.

Court of Queensland against the appellants in the month of September, 1892, whereby he claimed damages from them for having so negligently made a drain across Ann Street, in the town of Brisbane, as to be dangerous to persons lawfully passing over and along the street; and in the alternative he alleged that the appellants had neglected to put the street into a proper state of repair and suffered it to remain in a dangerous condition. The appellants denied that they were guilty of any negligence.

The action was tried before Harding, J., and a jury in the month of October, 1892, when evidence was adduced on the part of the respondent to prove, and on the part of the appellants to disprove, the alleged negligence. The jury found by their verdict that there was no negligence on the part of the appellants, and thereupon judgment was entered for them. On a motion by the respondent for a new trial, the Full Court made an order setting aside the verdict and judgment, and directing a new trial. The present appeal, which has been heard ex parte (the respondent having intimated that want of means prevented his appearing), is from that order.

The result of the evidence may be shortly stated thus: It appears that in October, 1888, a drain was commenced, by the orders of the appellants, under Ann Street, which was completed in the following April; and it was not until nearly four years afterwards that anything occurred to indicate that the drain was not in every respect properly constructed, and capable of satisfying all the purposes which it was intended to fulfil. On the 28th of May, 1892, the respondent was driving along the street at the rate of about six miles an hour, when his horse fell down, and he was thrown from the top of his cab on to the road, and severely injured. It appeared that the horse had put one of its feet into a hole about fifteen inches deep, and, to use the expression of the respondent, "about the size of an ordinary sized dinner plate." The ground had apparently broken away and sunk under the horse's feet, and it was ascertained that the hole had formed over the place where the drain had been constructed.

The case of the respondent was that the appellants were responsible for the hole, and were guilty of negligence in respect

J. C.
1894

Council of the Municipality of Brisbane
v.
Martin.

of it, either because there was an original defect in the construction of the drain—the ground over it not having been sufficiently rammed—or because they had failed to foresee and provide against the soakage which afterwards took place, and which removed a certain quantity of soil, and thus caused the cavity.

The appellants, in reply to the respondent's case and witnesses, adduced a considerable body of evidence to shew that the drain was originally constructed in a proper manner. Mr. Rogers, their engineer, said that, as far as he saw it, "it could not have been done better," and that when the trench and tunnel were opened out he saw nothing to indicate a soakage. Mr. Everingham, who was manager of the Brisbane Tramway Company from January, 1888, until October, 1890, said that he remembered the drain being constructed across Ann Street; that he took particular interest and special care that it was properly constructed underneath the tramway, seeing that he was connected with the tramway company; that he saw the tunnel being filled up; that according to his idea it was properly rammed; that he saw people ramming it; and that he was perfectly satisfied with the way in which it was done. Mr. Gailey, who was an architect and surveyor, and who examined the drain after the accident, said: "No person in making a drain of this sort in dry weather could foresee that there would be underground flow in wet weather. My opinion is that the cavity was caused by the percolation of water after rain washing away the fine sand or pipeclay and lodging it into beds of sand of coarser quality in or near the formation of the drain. . . . If the tunnel had been loosely rammed, I don't think it would have stood for four years."

Mr. Kirk, a civil engineer and contractor, gave evidence of a similar kind.

It may therefore be taken that there was evidence both ways as to the circumstances in which the cavity was caused which led to the accident. Their Lordships have not had the advantage of seeing at any length the summing-up of the learned judge who heard the case, from which they might have been able to gather his view of the evidence, although that would have been only an element in the case. They must deal with the matter according to the settled rule which has prevailed for a great number of years in this country. Was this verdict one which the jury, reasonably viewing the whole of the evidence, could properly find? It is not necessary for their Lordships to say how far they concur in the verdict. That is not the question. There being evidence both ways, it cannot be said that the jury might not reasonably arrive at the conclusion at which they did arrive. Their Lordships will therefore humbly advise Her Majesty to discharge the order for a new trial.

The appellants do not ask for their costs of the appeal, and their Lordships will direct accordingly.

Solicitors for appellant: *Anderson & Sons.*

[PRIVY COUNCIL.]

J. C.*
1894
April 25.

In re THE ENDOWED SCHOOLS ACT, 1869, AND AMENDING ACTS,

AND

In re THE FREE GRAMMAR SCHOOL IN SWANSEA, AND OF A SCHEME UNDER THE WELSH INTERMEDIATE EDUCATION ACT, 1889.

32 & 33 *Vict. c.* 56, *s.* 39—*Policy of a Scheme—Powers of the Commissioners—Religious Education—Rights of Patronage—Modern Endowment—Welsh Intermediate Education Act*, 1889, *s.* 13.

In an appeal under sect. 39 of the Endowed Schools Act, 1869, against a scheme framed by the Charity Commissioners under the Welsh Intermediate Education Act, 1889:—

Held, that the policy of the scheme cannot be considered. It can only be modified so far as it is not within the legal powers of its framers.

Where there was no direction to that effect in the original instrument of foundation, nor any regulations prescribed by the founder or under his authority in his lifetime or within fifty years after his death, the scheme need not provide for instruction in religion according to the Established

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* *Present:*—The Lord Chancellor, Lord Hobhouse, Lord Ashbourne, and Lord Macnaghten.

In re
THE ENDOWED SCHOOLS ACT, 1869, AND AMENDING ACTS.
In re
THE FREE GRAMMAR SCHOOL IN SWANSEA, AND OF A SCHEME UNDER THE WELSH INTERMEDIATE EDUCATION ACT, 1889.

Church. Such regulation cannot be presumed from any practice to that effect which may have obtained for many years.

In re St. Leonard, Shoreditch, Parochial Schools (10 App. Cas. 304), followed.

Sect. 13 of the Act of 1889 does not apply to rights of patronage which are not, at the date of the Act, exercised by a member of the governing body or possessed in consequence of his gift or donation.

A modern endowment under the Welsh Act is one which has been given since the Act of 1869. Such endowment applied in fitting up a crypt, being part of the old endowment, as a chapel, is so mixed therewith that it cannot be conveniently separated therefrom, and must be deemed to be part thereof.

THIS was an appeal by the trustees of the Swansea Free Grammar School against a scheme for the intermediate and technical education of the inhabitants of the county borough of Swansea, framed under the Welsh Intermediate Education Act of 1889.

The scheme, the nature of which sufficiently appears in their Lordships' judgment, provided that the income of the school endowments, together with the sums to be provided by the council of the borough, and the Treasury grant payable under sect. 9 of the Act of 1889, are to be applied in maintaining in the grammar school buildings, enlarged for this purpose, a day-school of intermediate and technical education for not less than 200 boys, and also a day-school for girls, under a new governing body who will appoint the head master. The scheme made provision for religious instruction and religious exemptions in accordance with sect. 15 of the Endowed Schools Act, 1869, and sect. 4, sub-sect. 3, of the Act of 1889.

The petitioners objected to the scheme—(1.) That the school is excepted by sect. 19 of the Endowed Schools Act, 1869, from the provisions therein contained respecting religious instruction and attendance at religious worship, and that the scheme does not make provision respecting religious instruction or attendance at religious worship of the scholars and respecting the religious opinions of the governing body or masters; (2.) That the scheme contains no saving or compensation for the vested interests of the persons for the time being heirs-at-law of Bussy Mansell hereinafter mentioned; (3.) That the scheme is not made in conformity with the Endowed Schools Act, 1869; and

(4.) That the scheme has not due regard for the religious and other educational interests of the scholars to which regard is required to be had by the said Act.

Finlay, Q.C., and *Ingpen*, for the trustees, contended that the scheme, having regard to its policy and provisions, was not within the scope of the Act of 1869. It interferes with part of the endowment originally given for the purposes of the school less than fifty years before the commencement of that Act without obtaining the assent of the governing body. It does not provide respecting the religious instruction or attendance at religious worship of the scholars, and respecting the religious opinions of the governing body or masters, while the school by sect. 19 of the Act is exempted from the provisions to that effect contained in the Act. Further, it does not save or make compensation for the vested interests of Bussy Mansell's heirs, nor does it have due regard to the religious and other educational interests of the scholars. The endowments of the school, which is a grammar school, are diverted to the purpose of an intermediate school. The teaching of the Church Catechism is prohibited, although the use of the liturgy, formularies, and catechism of the English Church has hitherto been an essential part of the school system. Reference was made to *In re St. Leonard, Shoreditch, Parochial Schools* (1); *In re Christ's Hospital* (2).

The Solicitor-General (Sir *John Rigby*) and *Vaughan Hawkins*, for the Charity Commissioners, were not heard.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR :—

The petition before their Lordships relates to a scheme which has been framed by the Charity Commissioners under the Welsh Intermediate Education Act, 1889 (52 & 53 Vict. c. 40). That Act provides that "It shall be the duty of the joint education committee . . . of every county in Wales and of the county of Monmouth, to submit to the Charity Commissioners a scheme or schemes for the intermediate and technical education of the inhabitants of their county, . . . specifying in each scheme the educational endowments within their county which in their opinion ought to be used for the purpose of such scheme." Instead of submitting a scheme the joint education committee may submit to the Charity Commissioners proposals for a scheme. Proposals for a scheme were submitted by the committee, specifying the endowments of the Swansea Free Grammar School as endowments which, in the opinion of the committee, ought to be used for the purpose of the scheme, and the scheme under consideration was framed by the Charity Commissioners accordingly. By sect. 12 of the Act of 1889, "An educational endowment within the county of a joint education committee means any educational endowment which is applied in the county or is appropriated for the benefit of the natives or inhabitants of the county, or of some of such natives or inhabitants, or their children." It is not disputed that the Swansea Free Grammar School was "an educational endowment" within the definition of sect. 12, and therefore one with which it was competent to deal in a scheme of this description.

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(1) 10 App. Cas. 304.

(2) 15 App. Cas. 172.

The petitioners appeal to Her Majesty in Council against the scheme, as they are empowered to do, under sect. 39 of the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), which applies to schemes framed under the Welsh Intermediate Education Act. That section specifies certain grounds of objection to a scheme which may be the subject of appeal to Her Majesty in Council, and it is not within the power of their Lordships to entertain an appeal upon any other than those grounds. It is entirely beyond the scope of their duty to consider the policy of the scheme, and they have no power to determine that any modifications should be made in it, unless it is established to their satisfaction that the scheme is one which was not within the legal powers of its framers.

Three objections to the scheme have been taken by the petitioners. They say in the first place that the scheme ought to have provided for the instruction of children in religion according to the doctrine and formularies of the Established Church. That contention was not very strongly urged upon their Lordships, but so far as it has any foundation it must be rested upon the provisions of the 19th section of the Endowed Schools Act, 1869. The 2nd sub-section of that section provides that there is excepted from the provisions respecting religious instruction contained in the earlier part of the Act—"Any educational endowment, the scholars educated by which are, in the opinion of the Commissioners (subject to appeal to Her Majesty in Council as mentioned in this Act), required by the express terms of the original instrument of foundation or of the statutes or regulations made by the founder or under his authority, in his lifetime or within fifty years after his death (which terms have been observed down to the commencement of this Act), to learn or to be instructed according to the doctrines or formularies of any particular church, sect, or denomination."

The present case does not come within the words of this section. There is no such direction in the original instrument of foundation, nor have any statutes or regulations been put in evidence, made by the founder or under his authority in his lifetime or within fifty years after his death. Reliance was placed, and could only be placed, on the fact that at a comparatively recent period, namely, in 1862, there was a by-law or regulation of the school which required such instruction to be given to the scholars, and the suggestion was that inasmuch as this had been the practice for many years past it might be assumed that it had been the practice from the outset, having its origin in some regulation made by or with the authority of the founder. In reference to that contention, it is not necessary to do more than repeat that which was said by the Earl of Selborne when delivering the judgment of their Lordships in the case of *St. Leonard, Shoreditch, Parochial Schools* (1). His Lordship there said: "It is impossible to read the 19th clause of the Act of 1869 without being struck by the care and anxiety which the Legislature has exhibited there to prevent denominational restrictions from being applied to any school as to which there was not demonstrative evidence that the original founders of the school had not only formed, but expressed, an intention that the children should be instructed according to the doctrines or formularies of a particular church, sect, or denomination; or, in the added words of the later Act, should be members of a particular church, sect, or denomination. It is impossible not to be struck by the anxiety which the Legislature has displayed to exclude, not only every uncertain, but also every merely probable, implication from practice alone of such an intention." In that case the evidence of the practice went back to a much earlier date than in the present case—to a period of time much nearer the date of the gift; but their Lordships held that it was impossible properly to infer from any such practice the existence of an express direction, where there was no direct evidence of any document having existed containing such direction. That disposes of the first point.

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(1) 10 App. Cas. 304.

The next objection taken was, that the scheme was not in conformity with the Act of 1869, inasmuch as the Commissioners had not properly regarded the right of patronage of the Misses Talbot, the representatives of Mr. Bussy Mansell, who gave the site upon which the school was built. This right of patronage was vested by the terms of the original gift in Mr. Bussy Mansell in consideration of his having provided the site; and it was thereby provided that he was to appoint the schoolmaster, but that in case of a minority of any heir of his, the schoolmaster was to be appointed by the Bishop of St. David's. But the concluding words of sect. 13 of the Act of 1869 only apply to "Rights of patronage which may be at the passing of this Act exercised by any member of the governing body of such school in consequence of any gift or donation made by him." The present case appears to their Lordships to be clearly not within those words. The ladies in whom the right of patronage was vested were not members of the governing body, and such right of patronage as they possessed was not in consequence of a gift or donation made by them.

The only question which remains relates to the fact that between the years 1872 and 1876, as stated in the affidavit of Mr. Morris, a sum of money amounting to £1013 was raised by subscriptions, and applied in converting the crypt under the dining-hall of the school into a chapel; and that the chapel was completed in 1874, and has since been continually used for divine service according to the rites of the Church of England by the head master, who holds the licence of the bishop of the diocese to perform such service. It was argued that the sum thus given was a modern endowment within the meaning of the Act of 1869. Sect. 25 of the Act of 1869 provides as follows: "Where an endowment or part of an endowment originally given to charitable uses less than fifty years before the commencement of this Act has, by reason of having been spent on school buildings or teachers' residences, or playground or gardens attached to such buildings or residences, become so mixed with an old endowment given more than fifty years before the passing of this Act, that in the opinion of the Commissioners (subject to appeal to Her Majesty in Council) it cannot conveniently be separated from such old endowment, then the whole endowment shall for the purposes of this Act be deemed to be an endowment originally given to charitable uses more than fifty years before the commencement of this Act." The dividing line taken by the Act of 1869 between old and new endowments, the former being within and the other, speaking generally, being without the jurisdiction of the Charity Commissioners, was fifty years before the commencement of the Act. By the Welsh Intermediate Education Act, s. 13, the dividing line is made the date of the passing of the Act of 1869, and it is only endowments subsequent to the passing of that Act, which are not to be interfered with. The section provides further that the 25th and 26th sections of the Act of 1869 shall, for the purpose of a scheme under the Welsh Act, apply "as if the same . . . . were respectively in the said sections substituted for an endowment or part of an endowment originally given to charitable uses less or more than fifty years before the commencement of the said Act." Therefore, in order to make the gift in question a modern endowment, it has to be shewn that it was given since the Act of 1869. If it was so given, then the same question has to be considered under sect. 25 of the Act of 1869 as would have to be considered in the case of an endowment given within fifty years before the commencement of that Act.

The information which their Lordships have before them on the subject of the endowment in question is very meagre. Mr. Morris' affidavit only states that between August, 1872, and December, 1876, £1013 was raised by subscriptions, and applied to convert the crypt into a chapel. It is not stated that the subscriptions were given for that specific purpose, and there is nothing to shew precisely how the money was applied in converting the crypt into a chapel.

But what their Lordships have to consider is whether this money, taking it to be a modern endowment, has become so mixed with the old endowment that it cannot conveniently be separated from it. Now, the modern endowment has simply been applied in fitting up a room under the school building, namely, the crypt, as a chapel. No practical suggestion has been made to their Lordships, shewing how it would be possible to separate this endowment from the old endowment. It is admitted that it was competent for the scheme to deal with the old endowment, consisting of the old building, including the crypt. How could the endowment, which consisted merely of fitting up that crypt in a manner suitable for a chapel, even supposing it were shewn to have been given specifically for that purpose, be conveniently separated from the old endowment? In this case, surely, if in any, the new endowment has become so mixed with the old endowment that it cannot be conveniently separated therefrom.

For these reasons their Lordships will humbly advise Her Majesty that the petition be dismissed, but without costs.

Solicitor for the appellants: *Edward T. Turner.*

Solicitors for the respondents: *Farrer & Co.*

[PRIVY COUNCIL.]

J. C.*
1894
Jan. 24, 25;
April 28.

SYDNEY AND SUBURBAN MUTUAL BUILDING AND LAND INVESTMENT ASSOCIATION, LIMITED . . . . DEFENDANT;

AND

LYONS . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—7 *Vict. No.* 16, *ss.* 11, 22—22 *Vict. No.* 1, *s.* 18—*Registered Mortgage—Notice.*

Where the respondent had purchased at public auction eight lots of an estate and subsequently to the contract the vendor mortgaged by registered deeds the whole of the said estate including the said lots, to the appellant, who knew at the time of the advance that certain unspecified portions of the estate had been sold:—

Held, that according to the true construction of 7 Vict. No. 16, ss. 11, 22, and 22 Vict. No. 1, s. 18, the appellant gained no priority from registration but took subject to the respondent's purchase.

APPEAL from a decree of the Supreme Court (Dec. 11, 1891) decreeing specific performance of two contracts of sale, and ordering the appellant to join in executing the conveyances free of its mortgages. The facts are stated in the judgment of their Lordships.

Crackanthorpe, Q.C., and *Sewell,* for the appellant.

Cozens-Hardy, Q.C., and *Vaughan Hawkins,* for the respondent.

1894
April 28.

The judgment of their Lordships was delivered by

LORD MORRIS:—

The facts out of which this appeal arises are as follows: The Imperial Land Building and Deposit Company were the owners of a certain building estate known as "Henderson's estate," situate at Bondi, near Sydney. That company caused the estate to be put up for sale by public auction on the 5th of October, 1889, having previously advertised the sale in the *Sydney Morning Herald* of the 11th and 21st of September. The sale was in lots, according to a printed plan called the "sub-division plan," and upon terms of payment stated in the plan, a facsimile of which is set forth in the record. At the sale the respondent purchased four lots, Nos. 9, 10, 11, and 12 on section 2 of the plan, and the usual contract note was signed. The respondent on the same day made a verbal agreement for the purchase of four other lots, Nos. 13, 14, 15, and 16 on the same section. No defence of the Statute of Frauds has been raised, and the two purchases were treated as one transaction. The purchase-money for the whole of the lots was 878*l.* 10*s.* The respondent paid the deposit and first instalments of both purchases, and gave promissory notes for the balance, which were paid in due course.

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* *Present:*—LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

The respondent made various applications to the solicitor of the Imperial Building Company for an abstract of title to the lands bought by him, but none was furnished until the month of November, 1890. Subsequently to being furnished with the abstract the solicitor of the respondent, on search being made at the Registry of Deeds Office, discovered that on the 3rd of June, 1890, the Imperial Building Company had executed a mortgage to the appellants of the legal estate of the whole of Henderson's estate at Bondi to secure payment of the sum of 1050*l.* with interest, and by subsequent charges executed on the 17th of June, 1890, 23rd of July, 1890, and 31st of October, 1890, had charged the same estate with further sums, amounting in the aggregate to the sum of 3325*l.* beyond the said sum of 1050*l.*

The Imperial Building Company soon after fell into difficulties, and was ultimately wound up, and a liquidator was appointed. The abstract of title furnished to the respondent by the Imperial Building Company did not disclose the mortgage of the 3rd of June, 1890, nor any of the further charges. The appellants had registered the mortgage deed and the further deeds of charge immediately after the dates named. A question of priority now arises between the appellants, who rely on the registration of their deeds, and the respondent in respect of the contracts for sale.

Sect. 11. of the Colonial Act, 7 Vict. No. 16, is as follows: "And be it enacted that all deeds and other instruments (wills excepted) affecting any lands or hereditaments or any other property in the said part of the Colony of New South Wales which shall be executed or made bonâ fide or for valuable consideration and which shall be duly registered under the provisions of this Act, shall have and take priority not according to their respective dates but according to the priority of the registration thereof only."

Sect. 22 of the same Act is as follows: "And be it enacted that the term instrument hereinbefore used shall for the several purposes of this Act be construed to include not only conveyances and other deeds but also all instruments in writing whatsoever whereby real or leasehold estate or stock shall be affected or shall be intended so to be."

The Colonial Act, 22 Vict. No. 1 (The Titles to Land Act, 1858), by sect. 18 provides that "No instrument hereafter executed and registered under the provisions of any Act in force for the registration of deeds shall lose any priority to which it would be entitled by virtue of such registration by reason only of bad faith in the conveying party if the party beneficially taking under such instrument acted bonâ fide and there was a valuable consideration for the same paid or given."

The appellants claim to hold the lands in question as against the respondent by virtue of the said Acts, on the ground that they were bonâ fide purchasers, without notice of the respondent's claim. The question is whether in the circumstances of this case the appellants are bonâ fide purchasers. The respondent impeaches the bona fides of the several deeds of mortgage: 1st, on the ground that the appellants had actual notice of the sale of some of the property comprised in their deeds. 2ndly. That the real agreement between the appellants and the Imperial Building Company was for security to be given only of the unsold portions of the estate. It appears that Mr. Callaghan was a director of the appellant company, and that Mr. Green was a director of the Imperial Building Company. They had communication with each other on behalf of their respective companies, with the object of the Imperial Building Company getting a loan which it most urgently required. Mr. Callaghan alleges that his first communication with Mr. Green was on the 2nd of June, while Mr. Green alleges that upon the 29th of May a letter was written at a board meeting of the Imperial Building Company as follows:—

"The Manager, Sydney and Suburban Building Society.
"Post Office Chambers,
"Pitt Street,
"29th May, 1890.

"Dear Sir,—Referring to the interview between Mr. Callaghan and Mr. Green, one of my directors, I beg to apply for a temporary loan of 1000*l*. We will lodge as security for the advance the deeds relating to the title of the Henderson's Estate, Bondi, of the unsold and those of the sold allotments which have not been conveyed. We will also lodge the promissory note of the directors and an undertaking to sign mortgage when called upon.

"Faithfully yours,
"Wm. P. Smairl, Manager."

Three of the directors, Mr. Green, Mr. Martin, and Mr. Manning, as well as Mr. Smairl, all depose to the writing of the letter, and in the letter-book of the Imperial Building Company a press copy of the letter is contained. All the witnesses prove that the letter on being written was handed to Mr. Green to be taken by him to the appellants' office which was quite near, and that Mr. Green took the letter away, and shortly after returned stating that the loan would be granted in the terms of the letter. Mr. Green deposes that he left the letter with some one—he cannot now recollect who it was—in the office of the appellants. On the other side, Mr. Callaghan and the other directors of the appellant company, and Mr. Lewis, their manager, denied all recollection of having received the letter, and the clerk in charge of the office of the appellants denied having received it. The learned judge at the trial came to the conclusion that the letter was written, and that it was left by

Mr. Green at the appellants' office on the 29th of May, but that it was extremely probable it was lost.

Their Lordships do not consider it necessary to decide whether the letter reached the hands of the directors or of the manager of the appellant company, because they are of opinion that upon the facts of the case the appellants were aware that the mortgage deed of the 3rd of June, 1890, was not a real conveyance of what it purported to convey. On the 2nd of June, 1890, Mr. Smairl purports to sign a formal application to the directors of the appellants for the loan. The application is filled in by Mr. Lewis. It sets forth that the estate upon which the loan was to be secured was the whole of the Henderson estate "as per sub-division plan." Mr. Smairl alleges that this application was signed by him in blank at Mr. Lewis' request a few days after the loan had been made, and that Mr. Lewis, in reply to Mr. Smairl's statement that he had already sent in an application in writing on the 29th of May, said it would be attached to the application form. All this is denied by Mr. Lewis. It becomes unnecessary to decide which of these conflicting statements is the true one, for it cannot be denied that the application form referred to the sub-division plan, and that the sub-division plan was before the board of directors of the appellant company. What follows? Mr. Smairl brought to the office of the appellant company the deeds of the entire property to lodge them as security for the advance. On the 3rd of June he called with Mr. Callaghan at the office of the solicitors to the appellants, and saw Mr. Weaver, the managing clerk. Mr. Weaver advised that a legal mortgage of the property should be given as security. Mr. Weaver ascertained on search that some of the property had been sold and conveyed and the conveyances registered. He then, he says, either saw or wrote to Mr. Lewis. There was not time to make proper inquiries on the part of the appellants, as the transaction was to be completed and the advance made to the Imperial Building Company on that day, the 3rd of June. Consequently Mr. Weaver inserted the entire estate as being mortgaged, although he knew, and the appellants' directors and Mr. Lewis all knew, that the mortgage would include lots actually conveyed and registered. Their Lordships are of

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opinion that the real contract between the parties was for an advance to be made on the unsold portion of the estate, and that the appellants took as security the Henderson estate valeat quantum—subject to what it turned out to be. To Mr. Weaver was delegated how to carry out this arrangement. It was admittedly done in an extremely hurried manner. Mr. Weaver prepared a legal mortgage of the whole of the estate—that is, a mortgage of the entirety of a property of which his employers well knew lots had been already sold, though they may not have known what particular lots. The deeds on which the appellants rely do not evidence the reality of the contract by parol, and can be no better than an equitable mortgage would be. They include what the mortgagees knew they had no right to get from the mortgagors, and cannot be considered a bonâ fide purchase as against the respondent. Their Lordships have consequently come to the conclusion that the judgment of the Supreme Court of New South Wales should be affirmed, and they will humbly advise Her Majesty accordingly. The appellants must pay the costs of this appeal.

Solicitors for appellants: *P. J. Gordon & Son.*
Solicitors for respondent: *Want & Co.*

[PRIVY COUNCIL.]

J. C.*
1894
Jan. 31;
Feb. 1, 2;
March 7, 10;
April 28.

BANK OF CHINA, JAPAN, AND THE STRAITS, LIMITED . . . . DEFENDANT;

AND

AMERICAN TRADING COMPANY . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT FOR CHINA AND JAPAN.

Exchange Contracts—Condition precedent—Repudiation.

Where bankers sold exchange contracts to the respondent, i.e., undertook to pay in exchange for silver sterling money or its equivalent within certain limits as to time at a specified rate, but stipulated that the goods in payment for which such silver was required should be financed through them:—

Held, in actions on the exchange contracts, that financing the goods as stipulated was a condition precedent to the fulfilment of the exchange contracts. But both parties were placed under a mutual obligation to settle reasonable terms of financing, and as the bankers repudiated such obligation the respondent was entitled to judgment.

The evidence as to the parties' respective compliance with such condition precedent being in London, their Lordships directed it to be taken on commission instead of remitting the case to Shanghai.

APPEAL from a judgment of the Supreme Court (July 11, 1892), directing the appellant to pay to the respondent the sum of 38,865 taels, with costs.

The suit was to recover damages for the breaches of several contracts to sell and deliver certain amounts of sterling money in Shanghai at certain specified rates of exchange.

The facts are stated in the judgment of their Lordships. The case, after argument, stood over for evidence to be taken under commission, and was re-argued on the 7th of March.

The *Solicitor-General* (Sir *John Rigby*), *Latham*, Q.C., and *J. W. M'Carthy*, for the appellant, contended that the exchange contracts sued upon were made subject to a condition of which

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the respondent had notice. The appellant bank, not being an exchange bank, did not in the ordinary course of its business sell exchange contracts except against goods which it financed. The condition was that the exchange contracts were only to hold good subject to an arrangement between the London offices of the parties as to financing the goods to which those exchange contracts related. Even if the condition was not fully understood, and it should be held that the exchange contracts were absolute, then it was an integral part of such contracts appearing on the face of them that the goods to which they related should be financed through the appellant's London bank; and as the respondent did not carry out such stipulation, he was not entitled to recover. Reference was made to *Pym* v. *Campbell* (1); *Wallis* v. *Littell* (2); *Bowes* v. *Shand* (3); *Atkinson* v. *Smith* (4); *Graves* v. *Legg* (5). With regard to damages, they were assessed by the Chief Justice on an erroneous principle. The true measure is the difference between the contract prices and the price at the date when the respondent was informed that the appellant did not intend to perform such contract: see *Roper* v. *Johnson* (6); *Frost* v. *Knight* (7); *Brown* v. *Muller* (8).

Green, Q.C., and *Chapman*, for the respondent, contended that the contracts were ordinary exchange contracts as understood by business men in Shanghai, with an option to the bank—a stipulation introduced for the appellant's benefit and capable of being waived by the bank—to finance the goods in question. They were absolute contracts, not contracts upon a condition. The agreement relative to financing was collateral. The appellant broke the exchange contracts by refusing to perform them. As regards the collateral agreement, it was not contended that the bank was bound to finance the goods, or broke the contract by not doing so. The respondent company had complied with its obligation in relation thereto by its readiness and willingness to finance the goods in the stipulated way, provided the bank was willing to accord reasonable terms in that behalf. On the subject of condition precedent they referred to *Bettini* v. *Gye* (1) and *Graves* v. *Legg* (2).

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(1) 6 E. & B. 370.
(2) 31 L. J. (C.P.) 100.
(3) 2 App. Cas. 455.
(4) 14 M. & W. 695.
(5) 9 Ex. 709.
(6) Law Rep. 8 C. P. 167.
(7) Law Rep. 7 Ex. 111, 115.
(8) Law Rep. 7 Ex. 319.

The *Solicitor-General* replied.

1894. April 28. The judgment of their Lordships was delivered by

LORD WATSON:—

The appellants carry on the business of bankers in London and Shanghai. The respondent company trade as merchants and commission agents in New York, Shanghai, and London, and part of their business consists in purchasing goods in Great Britain and America, which they export to and sell in China, receiving payment of the price in silver currency.

It appears to be a common practice for merchants in Shanghai, upon their entering into contracts for future delivery, to guard against any speculative risk arising from the possible fluctuation of the rates of silver exchange, between the date of sale and the time when the goods arrive and are delivered, by purchasing what are termed exchange contracts. These are simply contracts by which a bank, or other financier, undertakes to pay to the merchant, within certain limits of future time, sterling money, or its equivalent, in exchange for his silver, at a specified rate. It also appears to be an arrangement not uncommon, that the same bank which makes the exchange contract shall finance the goods, or, in other words, shall, in some shape or other, make advances to the merchants, upon the security of the goods.

In August, 1891, Mr. Talbot, the appellants' representative at Shanghai, and Mr. Forbes, the respondents' manager there, were introduced to each other, with a view to business, by Mr. Morriss, an exchange broker. They discussed, apparently on three occasions, the subject of exchange contracts, and also of financing the goods, Mr. Talbot intimating that the first of these matters was one within his control, whilst the second must be settled by the London office of the bank. On the 11th of August, the last of these occasions, Mr. Talbot agreed, pending negotiations, to give the respondents an exchange contract for £5000 without any condition as to financing goods, which on the following day was embodied in a contract note by Mr. Morriss as broker for the parties. As to that contract no question is raised in this case.

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(1) 1 Q. B. D. 183.

(2) 9 Ex. 709.

Between the 13th and the 31st days of August, 1891, both inclusive, the bank at Shanghai entered into nine separate exchange contracts with the company. The result of these contracts was, that the bank became bound to give the company the sum of £57,500 sterling in exchange for taels 255,938. 93c., the rates of exchange ranging from 4*s.* 5¾*d.* to 4*s.* 6⅛*d.* per tael, the dates of settlement being various periods, from December, 1891, to May, 1892. Upon the face of each of the contract notes there were written by the broker who made it "goods financed through Bank of China," or similar words.

In point of fact, none of the goods to which these contracts applied were financed by the bank, nor did the bank give sterling money against taels, in terms of the exchange notes. As the goods arrived at Shanghai and were paid for, the company purchased, with silver, the sums sterling specified in these notes, at the current rate of exchange, which had continued to decline from and after the month of August, 1891. The result was that the company had to pay upwards of taels 38,000 beyond the amount which they would have had to pay to the bank under these nine contracts.

The company brought two actions against the bank, before the Supreme Court of Her Britannic Majesty for China and Japan, one in March and another in June, 1892. These actions have been treated as a single suit, both in the Court below, and before this Board. They cover the nine exchange contracts in question, which are alleged to have been broken by the bank, and the sums in silver actually paid by the company in excess of the rates of silver exchange fixed by the contracts are claimed as damages. The company admit that the conditions as to financing their goods through the bank were obligatory, but plead that they were duly complied with, so far as they were concerned, and also that the fulfilment of such conditions was not essential, inasmuch as they were collateral with and not precedent to the agreements for exchange. In defence, the bank, whilst denying that the company had given them an opportunity of financing the goods, mainly relied upon the plea that the exchange contracts were inoperative, because it was matter of mutual stipulation that their existence was to depend upon the London office of the bank agreeing to finance the goods, which it never consented to do.

The learned Chief Justice appointed the trial of these causes to take place before himself, for the purpose of hearing and determining all questions raised in the pleadings "except the questions whether the conditions precedent (if any) which the Court may find, were to be performed by the plaintiffs in London, or elsewhere than Shanghai, were performed by the plaintiffs, and whether the performance thereof by the plaintiffs was excused by the defendants." At the trial, both parties led evidence, subject to that reservation, and thereafter it was adjudged that the company should recover from the bank the sum claimed in both actions, with costs of suit.

It was held by the learned judge who tried the cause, that the broker's contracts, upon which the actions were founded, were complete in themselves, and were not, as the bank maintained, determinable in the event, which occurred, of the company failing to make an arrangement with their London agency, as to the terms upon which the goods were to be financed. In that finding their Lordships concur. There is no evidence, either internal or external, that these contracts were subject to any suspensive or resolutive condition. It does appear that Mr. Talbot and Mr. Forbes did not entertain the same views of the import of the communications which passed between them at their meetings on the 11th of August and previous days. Mr. Forbes seems to have understood that arrangements for financing goods were to be independent of exchange, and were to be made with the London office of the bank, after contracts were completed in Shanghai. Mr. Talbot, on the other hand, was under the impression that no exchange contracts were to be made by him until the company had arranged terms of finance with his London office. But his own testimony shews that he gave an unqualified assent to the contracts in question, as made

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by the brokers on behalf of the bank, he being at the time in the belief that such preliminary arrangements had already been made in London. His belief was no doubt erroneous; but their Lordships are satisfied that it was not induced by any misrepresentation of the company or their agents.

The learned judge was also of opinion that, although the arrangement for financing goods through them formed part of the consideration in respect of which the bank agreed to give exchanges, it did not constitute a condition precedent of their so doing; and that the company's claim for loss of exchange was therefore maintainable, notwithstanding their having violated the arrangement. Upon that point their Lordships are unable to concur in his decision. The circumstance that one of the conditions of a contract only affects part of the consideration is not per se sufficient to make it collateral to the main contract. It is capable of being so construed, but cannot be so regarded, unless it also appear that the condition was not intended by the parties to go to the root of the whole contract. In this case, it appears to their Lordships that the condition as to financing of the goods, written upon the face of the contract notes, was meant to qualify the undertaking of the bank to purchase silver at a specified rate from the company. It was purposely omitted from the contract note of the 11th of August, because, in that instance, the contract of exchange was to be independent of any arrangement to finance goods through the bank; and, in the opinion of their Lordships, the fair inference derivable from the manner in which the condition was introduced into all the subsequent notes is, that the parties meant, not to add an independent and collateral arrangement, but to add a condition to the contracts of exchange embodied in these notes.

Having come to the conclusion that due compliance with their agreement to finance goods with the bank was a condition precedent of the company's rights to demand fulfilment of the exchange contracts, their Lordships were not, owing to the state of the record, in a position to dispose of the case by a final judgment. The company had not been allowed to lead proof of their allegations that they had done all that was incumbent upon them, in order to comply with the condition precedent, and their averments on that point were disputed by the bank. Seeing that the evidence which the parties were prepared to offer was to be found in London, their Lordships thought it right, instead of remitting the case to Shanghai, to allow a proof to be taken by commission. That was accordingly done, and parties were heard upon the question whether the Company had or had not done everything that they were bound to do in order to fulfil their obligation to finance their goods through the bank.

In the view which their Lordships took, to the effect that the stipulation as to finance was a condition precedent, neither of the parties raised any controversy as to its true import. It may be convenient to indicate here the construction on which they were substantially in agreement, and from which their Lordships see no reason to dissent. The stipulation was meant to be one in favour of the bank, and for their interest; and the bank was under no absolute obligation to accept the duty of financing if they found the performance of that duty proved to be incompatible with their business engagements. If the bank did not desire to undertake the duty, they were bound to give reasonable notice, so as to enable the company to make financial arrangements elsewhere. If the bank wished to finance the goods, it was as much incumbent upon them as upon the company to suggest and to endeavour to settle reasonable terms. On the other hand, the company were bound to give the bank the option of either accepting or declining the duty of financing the goods; and also to do their best towards the adjustment of reasonable terms in the event of the bank's acceptance. It is unnecessary, for the purposes of this case, to enter more minutely into the consideration of the obligations which were incumbent upon either party.

The proof adduced under the commission granted by their Lordships adds very little, in their opinion, to the material facts previously disclosed in the history of the transaction and in the correspondence of the parties. It is sufficiently obvious that throughout the negotiations with regard to finance, which began shortly after the date of the last of the contracts, and were conducted by their representatives in London, the parties were at cross purposes, owing to the different views which they entertained of their legal position. The bank acted upon the footing that the existence of the exchange contracts was wholly dependant upon their choosing to agree to terms for financing the goods, and that they were entitled to decline any terms which might be offered by the company, and by so doing to avoid liability for exchanges. Seeing that the rate of exchange gradually declined during the period of the negotiations, it was hardly to be expected that the bank, in the view which they took, should have accepted any terms of finance which were insufficient to recoup them for the loss which they would probably incur upon exchange, in the event of their acceptance. The company, on the other hand, appear to have acted on the true construction of the contract, and to have recognised the fact that they as well as the bank were placed by its terms under a mutual obligation to settle reasonable terms for the financing of their goods.

The bank were by no means precipitate in breaking off the negotiations; and, had exchange rates risen, it does not appear to their Lordships to be improbable that they would have ultimately arranged terms of finance. But the bank never receded from the position which they originally took up, and to which they adhered in their defence to this action, that they had the option to determine whether the exchange contracts should come into existence or not, by their agreement or refusal to finance goods. Towards the end of November, 1891, the bank at length resolved to adopt the latter of these alternatives. On the 26th of that month Mr. Talbot, their agent in Shanghai, made this communication to Mr. Forbes, the representative of the company in that city: "A telegram from the head office of this bank states that, inasmuch as no arrangement had been made there up to the 20th instant in connection with goods to be shipped to Shanghai on your account, the conditional settlements of exchange for forward delivery are void." To that intimation Mr. Forbes replied by letter of the 27th of November, in which he notified the fact that, owing to the refusal of the bank in London, his company had been compelled to pass their drafts for goods ready for shipment through other banks, and added: "I understand that your London office intend their refusal to apply to all contracts made with you; but I wish to say that, as a large part of the goods has still to come, we are prepared to send such goods through your bank in accordance with our contracts." The bank took no notice whatever of that communication.

Their Lordships do not think it admits of doubt that the intimation thus made by the bank, coupled with their failure to give any answer to the inquiry made by the company, amounted to a complete repudiation of all the contracts, whether for finance of goods or for exchange; and that the company were absolved from the necessity of making further offers to settle terms of finance, in order to preserve their claims of damage for breach of the contracts of exchange.

In this appeal, the bank renewed the objection which was taken by them, and overruled in the Court below, to the measure of damages as claimed. They maintained that, when the rate of exchange was steadily falling, it became the duty of the company to mitigate the loss which would fall upon the bank, in the event of their being held to have broken the contracts in question, by making forward contracts of exchange at current rates. In the opinion of their Lordships, it is sufficient for the purposes of the present case to say, that there is neither allegation nor proof to the effect that the company failed to take any reasonable means for protecting the pecuniary interests of the bank.

Their Lordships, for these reasons, have come to the conclusion, although upon different grounds from those assigned by the learned judge, that the respondent company are entitled to retain the judgment which they obtained in the Court below. They will accordingly humbly advise Her Majesty to affirm that judgment. The appellant bank must bear the costs of this appeal.

Solicitors for appellant: *Harwood & Stephenson.*
Solicitors for respondent: *Gibson, Weldon, & Bilbrough.*

[PRIVY COUNCIL.]

NATIONAL STARCH MANUFACTURING COMPANY AND OTHERS . . . . . PLAINTIFFS;

AND

MUNN'S PATENT MAIZENA AND STARCH COMPANY AND OTHERS . . DEFENDANTS.

J. C.*
1894
Feb. 2, 6, 21;
April 28.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Trade Marks Act, 1865—*User of Trade-mark—Laches—" Maizena"—Publici juris.*

Where the appellants, in 1889, registered in the Colony under the Trade Marks Act, 1865, the word "Maizena," which they had invented in 1856, registered and enforced in other countries, but had for a quarter of a century allowed to be used in the Colony as a term descriptive of the article, and not of their own manufacture thereof:—

Held, that the word had thereby become publici juris, and was no longer registerable as a trade-mark.

Where the respondents had applied the word to their own manufacture, but did not try to pass the same off as that of the appellants by the use of labels and packets calculated to deceive the public on that point; stating, on the contrary, the name of the maker, place of manufacture, and other necessary particulars:—

Held, that they could not be restrained from so doing.

APPEAL from a decree of the Chief Judge in Equity (Sept. 13, 1892), in a suit by the appellants, and a counter-claim by the respondents.

The facts are stated in the judgment of their Lordships.

The questions were: (1.) Whether the appellants are entitled to restrain the respondents from continuing to use the word "Maizena" and certain commendatory words in connection with a corn-flour manufactured by them and their predecessors in business; and (2.) whether the appellants are entitled to have the word "Maizena" retained on the Register of Trade Marks in the colony of New South Wales as their trade-mark for corn-flour manufactured by them.

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* *Present:*—LORD WATSON, LORD ASHBOURNE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

The judge found as a fact that there was no evidence of any fraud on the part of the respondents in the use by them of the word "Maizena," or in the continued user of the same word, and that there was no attempt to deceive the public, nor any deception in fact. He held further that the word "Maizena" was in the year 1889 publici juris in New South Wales, and ought not to have been registered as a trade-mark, and he ordered that the said word be removed from the Register of Trade Marks; also that any right the appellants might have had to prevent the use of the word was lost by their delay in asserting such alleged right.

Aston, Q.C., Sir *Richard Webster*, Q.C., and *Sebastian*, for the appellants, contended that the judgment should be reversed on the broad ground that the acts of the respondents and their predecessors in business were continuously wrongful, calculated to deceive the public and to induce them to purchase the respondents' corn-flour as the appellants' corn-flour. They had used the appellants' trade-mark "Maizena" to which the appellants had acquired an exclusive right, and continued such user after the appellants had registered it. They had all along had full notice of the appellants' user of the word as their trade-mark. They referred on their wrappers to a prize medal gained by the appellants in such terms as to suggest that it had been gained by themselves. They had a patent for certain machinery used in their manufacture, and they referred thereto in terms which suggested that the corn-flour was patented instead of or as well as the machinery. They further contended that the word "Maizena" had not become publici juris. A state of things had not ensued in the colony according to which every one was justified in manufacturing corn-flour from maize and calling it Maizena. The word had not lost its distinctive force as descriptive of the appellants' manufacture exclusively; for they were the registered proprietors of the word as a trade-mark, and were actively enforcing their rights in many parts of the world. Reference was made to *Seixo* v. *Provezende* (1); *Ford* v.

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(1) Law Rep. 1 Ch. 192.

Foster (1); *Rodgers* v. *Rodgers* (2); *Mitchell* v. *Henry* (3); *In re Heaton's Trade Mark* (4).

Cozens-Hardy, Q.C., and *Warrington*, for the respondents, were not heard.

1894. April 28. The judgment of their Lordships was delivered by

Lord Ashbourne:—

This is an appeal from a judgment of the Chief Judge in Equity of the Supreme Court of New South Wales in a suit in which the appellants were plaintiffs and the respondents were defendants, and in a counter-claim thereto in which the respondents were plaintiffs and the appellants were defendants. The judge dismissed the suit with costs and allowed the counter-claim with costs.

In the suit the appellants claimed to be entitled to the exclusive use in the colony of New South Wales of the special and distinctive invented word "Maizena" as their trade-mark; and that such word was properly registered in the colony as their trade-mark; and they charged the respondents with having so got up and packed their goods as to lead to the belief that their goods were the goods of the appellants, and to cause or enable their goods to be passed off as the goods of the appellants. The contention of the parties raised two distinct questions: their right to register in New South Wales the word "Maizena" as their trade-mark under the Trade Marks Act of 1865 (28 Vict. No. 9); and whether the respondents independently of that Act had violated the common law rights of the appellants by fraudulently making up their goods so as to deceive and pass them off as made by the appellants.

The suit was instituted to restrain the respondents from using the word "Maizena" for or in connection with their goods and for consequential relief.

The defendants in their counter-claim prayed, on the other hand, for a declaration that the term "Maizena" is and was previously to December, 1889, a word publici juris in the colony and should be ordered to be removed from the Register of Trade Marks.

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(1) Law Rep. 7 Ch. 611.
(2) 31 L. T. (N.S.) 285.
(3) 15 Ch. D. 181.
(4) 27 Ch. D. 570, 576.

The facts and dates in the case may be shortly stated.

In the year 1856 the appellants invented the word "Maizena" as their trade-mark for a starch or flour made from maize. In the year 1863 their agents, through Farrar & Co., of Melbourne, introduced "Maizena" into the Australian colonies. Large shipments were sent to those colonies for several years, but in consequence of a high tariff put on in 1871–72 the trade fell off, and it was alleged by the respondents that there was no evidence of any sales by the appellants of their "Maizena" between 1872 and 1885.

The appellants from time to time registered a trade-mark with this word "Maizena," and from time to time renewed the registration of their trade-mark in the United States of America, in the United Kingdom, and elsewhere. They also took steps to assert their rights in those countries where their trade-mark was registered.

The appellants, however, did not register their trade-mark "Maizena" in the colony of New South Wales until December, 1889, though the Trade Marks Act of 1865 permitted such registration, and provided in its 2nd section that "a mark shall not be recognised or considered to be the trade-mark of any person, until the same has been registered by or on behalf of the person claiming to be entitled thereto as his trade-mark."

The position of the respondents may now be stated. A firm of Uric Munn & Young, in Victoria, began in 1864 to manufacture corn-flour under the name of "Maizena." In 1866 M. A. Munn retired from the firm, and in 1867 he came to New South Wales, and there established a manufactory of "Maizena" at Merimbula in partnership with T. S. Mort and Sir William Manning. In August, 1867, Munn obtained Letters Patent in New South Wales for improved machinery for the manufacture of maize into "Maizena" or corn-flour. In December, 1867, he registered as his trade-mark a lion's head, with the motto, "Omnia vincit veritas," to be affixed to labels and packets of goods manufactured by him, "such as Maizena."

Other firms besides the appellants and respondents used the word "Maizena" in Australia between 1864 and 1889. From 1867 until shortly before the commencement of this suit no claim was ever made by the appellants to the exclusive use of the word "Maizena" in New South Wales.

The present question could not have arisen if the appellants had more promptly availed themselves of the Act of 1865. They did not do so until the year 1889, and the first substantial question in this case is, whether during the twenty-four years which elapsed between 1865 and 1889 the word had been so used in the colony as to make it no longer registerable as the appellants' trade-mark.

If during the period in question the word was only used in the colony for the fraudulent purpose of counterfeiting their goods, the right of the appellants to register it as their trade-mark would not be impaired. If, on the contrary, it was used and understood before 1889 as a term descriptive of the article, as a product of maize, and did not denote such product to be of the manufacture or merchandize of a particular person, then it must be regarded as having become, in the sense of law, publici juris, and was no longer registerable by the appellants as their trade-mark.

Accordingly the important question upon the evidence is whether, between 1865 and 1889, the word was used by the appellants lawfully, and by the respondents and others fraudulently, to denote corn-flour of the appellants' manufacture; or whether it was used and generally understood by purchasers to denote, not the manufacture of any particular person, but the character and quality of the article.

The appellants argue that the doctrine of publici juris cannot apply, as the respondents were guilty of fraud in originally appropriating the appellants' trade-mark, and as the use of it was continued in fraud. But their Lordships cannot find any evidence to support this contention, and they cannot ignore the lapse of time and all that has occurred in a quarter of a century. The appellants never registered the word as their trade-mark for twenty-four years, they never during that long period took proceedings to restrain the respondents from using it in New

South Wales. Moreover, during that time other firms in Australia had also used the word. Mr. Langdon, a witness for the appellants, and a partner of the firm of Farrar & Co., the sole consignees for the Australian colonies of the appellants' "Maizena" since 1863, said in his evidence: "We looked on 'Maizena' as a natural product, not as a trade-mark belonging to anybody." In considering whether the word "Maizena" had become publici juris in New South Wales in 1889 the acts of the appellants prior to that date must be carefully noted. They had taken proceedings against Munn and Young in Dublin in 1865 to prevent their selling "Maizena" in Ireland, and on the latter firm undertaking not to sell there the litigation ended. Again, similar proceedings were in 1881 taken before Mr. Justice Chitty in England (where their trade-mark had been registered in 1876), with a similar result. Objection was also taken in 1876 at the Philadelphia Exhibition to the use of this word by the respondents. It is to be fairly assumed that the appellants knew that the repondents were Australian merchants, manufacturing and selling "Maizena" in New South Wales, and until 1889 they gave no indication that they objected to the acts of the respondents as long as they were confined to that colony. It would thus appear that as far as they were concerned they left the word "Maizena" derelict there, leaving its use unfettered and free to become publici juris. It probably was not worth their while to interfere, for Mr. Palser in his evidence says that "the tariff of 1871 practically killed the importation of foreign Maizena and cornflower."

No full or exhaustive definition can be given of the circumstances which will make a word or name publici juris, and each case must depend upon its own facts.

In considering the question, it is important to bear in mind that the appellants do not claim any special right to the manufacture of "Maizena," or any exceptional method in making their "Maizena," and that the respondents and all other people have just as much right as the appellants have to manufacture the thing—no matter whether it is called "Maizena," corn-flower, or any other name.

Having regard to all the facts and evidence in the case it is impossible to resist the conclusion that in December, 1889, the date of registration, and for many years previously, the word "Maizena" had become publici juris, and their Lordships are therefore clearly of opinion that it was at the date specified not registerable by the appellants as their trade-mark.

The second question remains: Did the respondents try to pass off their manufacture as that of the appellants, and deceive or try to deceive the public on the subject? Although this question is distinct from the first, many of the reasons for the conclusion already stated are of weight. Fraud or intention to deceive must be made out. The appellants insist that the form of packet sold by the respondents, its make up, its colour, and the words printed upon it, indicate an intention to deceive, and to pass off the goods of the respondents as their manufacture. They rely particularly upon the use by the respondents of the statement on their wrapper of the words: "Of all competing Corn Flowers Maizena alone received a prize medal at the International Exhibition, London, 1862." On the appellants' wrappers are the words: "Of all competing articles of its class prepared from corn for food Maizena alone received a prize medal at the International Exhibition, London, 1862." The appellants obtained this medal. The respondents, it will be observed, are careful not to state that the medal was gained by them, and they enumerate in detail their own successes. If "Maizena" in the colony had come to denote a certain article simply, there would be nothing wrong in any one in the trade advertising that such and such prizes had been awarded to "Maizena," though the successful article was not of his own manufacture. But then the advertiser ought to make it perfectly clear that he claims no connection with the successful article beyond similarity in the process of manufacture and practical identity in the substance produced.

In the course of the argument their Lordships expressed their disapproval of the way in which the respondents were referring to the medal gained at the Exhibition of 1862, and they were glad to receive from Mr. Cozens-Hardy at the close of the appellants' case an undertaking (which will be embodied in their Lordships' report to Her Majesty) binding the respondents to discontinue the objectionable statement.

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1894

National Starch Manufacturing Company v. Munn's Patent Maizena and Starch Company.

Their Lordships think it right to add that the statement in question would have demanded more serious consideration, and probably very different treatment, if in their Lordships' opinion it had formed part of a scheme designed with the view of appropriating the appellants' custom, instead of being "an advertising trick," as Mr. Justice Owen describes it, not indeed very creditable to its authors, but yet one which could not in the circumstances deceive anybody into buying the respondents' "Maizena" in the place of the appellants'.

It was also contended that the use by the respondents of the word "patented" was evidence of fraud. As a fact they had a patent for the machinery by which their "Maizena" was made, and the representation, even if unfounded, would not bar the respondents' right to resist the appellants' claim.

Their Lordships have had before them, in the book of exhibits, copies of all the labels, and they have also seen samples of the packets used by both parties, and are themselves unable to arrive at the conclusion that the packets and labels of the respondents would or were likely to deceive the public. They state most clearly the names of the maker, place of manufacture, and other necessary particulars.

If the general effect of the labels and the words, colour, and make-up of the packets were calculated to mislead, liability could not be evaded by pointing out that if the words were spelt out and carefully examined and studied by a wary purchaser there would be no deception. But their Lordships can see no such general effect, and it is worthy of note that no evidence of any kind has been given shewing that any one was deceived.

Their Lordships will, for these reasons, humbly advise Her Majesty to affirm the judgment of the chief judge in equity and to dismiss this appeal. The appellants must pay the costs of this appeal.

Solicitors for appellant: *John Holmes & Sons.*
Solicitors for respondent: *Bell, Brodrick & Co.*

[PRIVY COUNCIL.]

LE MEUNIER . . . . PLAINTIFF;

AND

LE MEUNIER AND OTHERS . . . . . . DEFENDANTS.

J. C.*
1894
March 17.

FROM THE SUPREME COURT OF CEYLON.

Practice—Special Leave—Divorce Suit.

Special leave to appeal granted against a decree of the Supreme Court, reversing a decree of the District Court, and dismissing a suit for divorce.

THIS was a petition for special leave to appeal from a decree of the Supreme Court (Oct. 20, 1893), reversing a decree of the District Court of Matasa (Jan. 31, 1893), and dismissing the appellant's action, which was for divorce on the ground of his wife's adultery with three co-defendants, and for custody of the children of the marriage. The Supreme Court on the 19th of January, 1894, had refused leave to appeal to Her Majesty in Council.

The petition stated as above, and that the Supreme Court doubted its jurisdiction to grant the relief prayed, and submitted—(1.) that the Court was wrong in refusing leave; (2.) that the importance of the questions at issue both to the parties and to the public justified the grant of special leave.

Mayne, for the petitioner, contended that the Supreme Court was wrong in regarding the suit as below the appealable amount of Rs.5000. Though no damages were sought, the relief prayed, viz., freedom from the obligation to support a wife, must be worth more than that amount, the position of the appellant being that of a member of the Ceylon Civil Service. Sect. 781 of the Code of Civil Procedure, passed in 1889, authorized the grant of a certificate where, irrespective of the money value, the case was a fit one for appeal. Reference was also made to the Charter of the Supreme Court as published in Clark's Colonial Law.

* *Present*:—LORD WATSON, LORD MACNAGHTEN, and SIR RICHARD COUCH.

J. C.
1894

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With regard to the prayer for special leave, reference was made to *Hulm* v. *Hulm* (1), *D'Orliac* v. *D'Orliac* (2), *Shire* v. *Shire* (3), all of them from the Mauritius. There were conflicting judgments in this case, and a question of jurisdiction of great importance to all European inhabitants of the island.

LORD WATSON said that, under all the circumstances of this somewhat exceptional case, their Lordships would humbly recommend to Her Majesty that leave should be granted.

Solicitor for the petitioner: *J. J. Freeman.*

[PRIVY COUNCIL.]

J. C.*
1894
April 9.

AUSTRALIAN NEWSPAPER COMPANY, LIMITED . . . . DEFENDANT;

AND

BENNETT . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—Setting Aside Verdict—Evidence—Libel.

In an action for libel, a jury of four by a majority found a verdict for the defendants; the Supreme Court set aside this verdict, and ordered a new trial:—

Held, that this order must be discharged. There was evidence on which the jury could find that the defendant had not reflected upon the plaintiff's character.

The use of the word "Ananias," as applied to the plaintiff's newspaper, did not necessarily impute wilful and deliberate falsehood to him; whether it was used extravagantly or for the purpose of conveying an imputation on the plaintiff was a question for the jury.

APPEAL from an order of the Supreme Court (Aug. 4, 1891), directing a verdict for the appellant in a libel action to be set aside and a new trial to be had.

Present:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, and LORD MORRIS.

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(1) 4 Moo. P. C. 262.
(2) 4 Moo. P. C. 374.
(3) 5 Moo. P. C. 81.

J. C.
1894
AUSTRALIAN NEWSPAPER COMPANY v. BENNETT.

The facts are stated in the judgment of their Lordships.

Blake Odgers, Q.C., and *Alfred Adams*, for the appellant, submitted that it was a question of fact in what sense the words complained of were used, and whether they were or were not libellous. There were two issues before the jury: first, did the expression complained of relate to the respondent at all, and if it did was it used in a defamatory sense? The view which the jury took in favour of the appellant was such as reasonable men could take, and the Court was wrong in overriding its discretion.

Cozens-Hardy, Q.C., and *Fraser*, for the respondent, contended that the Supreme Court was right in setting aside the verdict. It was against the weight of evidence to such an extent as to be unreasonable. It was admitted on the pleadings that the words complained of were false. They conveyed an imputation upon the plaintiff's character in his conduct of his newspaper, and were necessarily so understood. [They referred to *Russell* v. *Webster* (1) and *Merivale* v. *Carson* (2).]

Counsel for the appellants were not heard in reply.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

This appeal arises in an action brought by the plaintiff, who is the manager, conductor, and part-proprietor of a newspaper known as the *Evening News*, printed and published in the city of Sydney, against the appellants, the Australian Newspaper Company, Limited, for a libel alleged to have been published in a newspaper conducted by them called the *Australian Star*.

The action came on for trial before Stephen, J., and a jury of four persons, and the jury by a majority of their number found a verdict for the defendants. An application was made to the full Court on behalf of the plaintiff, for a new trial, and a rule nisi was granted, and on the argument of the rule it was made absolute by a majority of two to one of the learned judges who composed the Court, Stephen, J., the learned judge who had tried the action, dissenting.

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(1) 23 W. R. 59.

(2) 20 Q. B. D. 275.

It appears that in the special edition of the *Evening News*, published on the evening of the day on which a boat-race took place between two oarsmen named Kemp and McLean, the *Evening News* published a statement that McLean had won the boat-race; but in the details which followed this statement it appeared that the race had really been won by Kemp. It was alleged that in another edition, published earlier on the same evening, the statement that McLean had won the race was not followed by any such details. On the latter point the evidence was conflicting. The *Australian Star* thereupon published certain paragraphs with reference to this incident. The first of these paragraphs contains the passage upon which the judgment of the Court below has proceeded. It is in the following terms: "According to the Market Street Evening Ananias, both Kemp and McLean won the boat-race yesterday. Poor little silly noozy." Windeyer, J., who pronounced the judgment of the majority of the Court, said: "Much of the matter complained of in the plaintiff's declaration, however low and vulgar in style it may have been considered by the jury, may have been regarded by them simply as badinage, imputing no dishonourable conduct to the plaintiff, and it is impossible for us to say that such a view might not be taken by reasonable men called upon to decide whether the article was or was not a libel. What the plaintiff, however, chiefly complains of is that portion of the writing declared upon contained in the words, 'According to the Market Street Evening Ananias, both Kemp and McLean won the boat-race yesterday.'" So that the judgment of the Court below has proceeded exclusively upon that part of the alleged libel. It does not, therefore, appear necessary for their Lordships to do more than deal with that portion of the alleged libel which alone induced the majority of the judges to come to the conclusion that there ought to be a new trial.

The innuendo attached to the words which have just been read, and upon which the plaintiff chiefly placed reliance, is as follows: "That the matter which the plaintiff was in the habit of publishing or allowing to appear in the said *Evening News* was such, and his conduct and management of the said *Evening News* was such, that the said *Evening News*, by reason of the publication of such matter, and by reason of such conduct and management on his part, had become notorious for wilfully false and lying statements intended to deceive the public, and that the said newspaper of the plaintiff was wholly unfit to be sold to, or read, or trusted by the public."

It is not disputed that, whilst it is for the Court to determine whether the words used are capable of the meaning alleged in the innuendo, it is for the jury to determine whether that meaning was properly attached to them. It was therefore the province of the jury in the present case to determine whether the words used were written of the plaintiff, and whether they bore the defamatory sense alleged.

Windeyer, J., observed in the course of his judgment that he admitted that the Court would only be justified in reversing the finding of the jury "if their decision upon that point is such as no jury could give as reasonable men." This is a correct statement of the law. Their Lordships have not, any more than the Court below had, to determine in the present case what is the conclusion at which they would have arrived, or what is the verdict they would have found. The only point to be determined is, whether the verdict found by the jury, for whose consideration it essentially was, was such as no jury could have found as reasonable men.

The judgment of the Court below was founded on the use of the word "Ananias." Windeyer, J., has expressed the opinion that only one meaning could be attributed to that word, that everyone must understand it to impute wilful and deliberate falsehood, and that therefore the mere use of the word "Ananias," which necessarily involves such an imputation, could not reasonably be held to be innocent, or to be otherwise than intended to cast this imputation upon the plaintiff. Even admitting that the natural effect of the use of the word "Ananias" standing alone would be to convey the imputation suggested, the learned judge appears to their Lordships, with all respect, to have lost sight of the fact that people not unfrequently use words, and are understood to use words, not in their natural sense, or as conveying the imputation which, in ordinary circumstances, and apart from their surroundings, they would convey, but extravagantly, and in a manner which would be understood by those who hear or read them as not conveying the grave imputation suggested by a mere consideration of the words themselves. Whether a word is, in any particular instance, used, and would be understood as being used, for the purpose of conveying an imputation upon character must be for the jury.

In the present case it is impossible to consider the use of the word detached from all that accompanied it in the newspaper issued by the defendants. The language used must be looked at as a whole in considering whether the jury could reasonably come to the conclusion that the use of the word was not intended to convey, and that those reading the newspaper would not understand it as conveying, the serious imputation suggested.

It is to be observed that the expression "Ananias" is used in relation to the newspaper, and not to the plaintiff individually. No doubt offensive language applied to a newspaper may cast a reflection, and be understood as casting a reflection, upon persons connected with the newspaper. But it clearly cannot be maintained that every imputation upon a newspaper is a personal imputation upon everybody connected with the newspaper. Whether it is an imputation which would attach to any individual, and, if so, to whom, must depend in each case upon the language used and upon the circumstances.

The suggestion contained in the innuendo in the present case, which has been adopted by the Court below, is that the use of the word imputed to the plaintiff that he was, in his conduct of the newspaper, guilty of making wilfully false statements.

Now, the statement in question was an erroneous statement as to the winner of the boat-race. There could be no motive suggested for wilfully making such a statement, knowing it to be false. To do so would only be to injure the credit and reputation of the newspaper. Would anyone of the public, when a statement of this sort was commented upon, suppose that the suggestion made was that the falsehood had been inserted on purpose? It seems difficult to understand how anyone could arrive at that conclusion. The paragraph, which has been already quoted, says: "According to the Market Street Evening Ananias, both Kemp and McLean won the boat-race yesterday." That, of course, refers to the *Evening News* having stated an impossibility as having occurred. When two men were racing against one another, both could not have won the race. One of those statements must be false. That would be the interpretation of it, or at all events (which is all that need be said) it might be the interpretation of it by anyone who read it, and it is in connection with that statement that the word "Ananias" is used.

The plaintiff was the part-proprietor, manager, and conductor of the newspaper. He was not the editor. There was no evidence given to shew that he would be supposed to be even responsible on any particular occasion for the literary or news contents of his newspaper. The only reference to him in the article complained of is the statement, "It will result in the defeat of several reporters and several dozen other employés, if we know Alfred aright." It is not disputed that by "Alfred" would be understood to be meant the plaintiff, the proprietor of the newspaper. So far, therefore, from suggesting that this statement was a wilfully false statement, either inserted or countenanced by the plaintiff, it was open to the jury to consider whether, read in connection with these words, the language used would not indicate that, whoever was responsible for the statement, no such responsibility rested upon the plaintiff, but that he would make those who were responsible for the blunder feel the result of it, by the loss of their employment.

The question therefore is whether in all these circumstances it can be said that a jury of reasonable men could not possibly find that the article, although it contains that which had much better not have been published, did not reflect upon the plaintiff's character, or even upon his conduct in relation to the newspaper. The jury have so found, and their Lordships are of opinion that it would be exceeding the legitimate function of the Court if the verdict were set aside and a new trial ordered, that the Court would then in reality be taking upon itself the function which the law has committed to the jury, of looking at the alleged libellous matter as a whole, and determining whether

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it is published of and concerning the plaintiff, and whether it bears the innuendo which the plaintiff seeks to attach to it.

For these reasons their Lordships are of opinion that the rule absolute should be set aside and the rule nisi discharged, and that the respondent should bear the costs of the rule absolute, and the costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.

Solicitor for appellant: *G. P. Slade.*
Solicitors for respondent: *H. Kimber & Co.*

[HOUSE OF LORDS.]

MACFARLANE AND OTHERS . . . . . APPELLANTS ;

AND

THE LORD ADVOCATE . . . . . . RESPONDENT.

H. L. (Sc.)
1894
June 1.

Revenue—Legacy Duty—Personalty directed to be invested in purchase of Land—Entail—Disentail—36 *Geo.* 3, *c.* 52, *ss.* 12, 19—55 *Geo.* 3, *c.* 184, *s.* 2.

By sect. 12 of 36 Geo. 3, c. 52, it is provided: "That the duty payable on a legacy or residue or part of residue of any personal estate given to .... different persons in succession who shall be chargeable with the duties hereby imposed at one and the same rate shall be charged upon and paid out of the legacy or residue or part of residue so given as in the case of a legacy to one person; and where any legacy or residue shall be given to . . . different persons in succession some or one of whom shall be chargeable with no duty or some of whom shall be chargeable with different rates of duty so that one rate of duty cannot be immediately charged thereon all persons who under or in consequence of any such bequest shall be entitled for life only or any other temporary interest shall be chargeable with the duty in respect of such bequest as if the annual produce had been given by way of annuity," and "all and every person and persons who shall become absolutely entitled to any such legacy or residue, &c., so to be enjoyed in succession shall when and as such person or persons respectively . . . . begin to enjoy the benefit thereof be chargeable with and pay the duty for the same . . . . in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed."

By sect. 19 it is provided: "That any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with and pay duty as personal estate; unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued" . . . . "Provided, nevertheless, that in case before the same, or some part thereof, shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons and raised and paid out of the fund remaining to be applied in such purchase."

A testator died on the 30th of September, 1883, leaving a will by which he directed his trustees to accumulate the whole rents and proceeds of the residue of his estate for six years after his decease, and during those six years to realize his whole movable estate and specified heritable property to the extent of about £350,000, and therewith at their discretion, within the six years or not, to purchase land in Scotland and entail the same on his nephew W. H. D. and the heirs male of his body, whom failing to other substitutes in succession, declaring that after the six years had expired the heir of entail in possession (W. H. D.) should be entitled to receive the interest of the entire property until the lands were purchased. The six years expired on the 30th of September, 1889. Afterwards W. H. D. presented a petition to the Court for disentail under the Scotch Entail Acts of 1848–1882. Having by private arrangement obtained the consent of the three next heirs (his sons), he obtained an order directing the trustees to convey in fee simple the lands and the moneys held by them. The trustees had only laid out about £21,000 in land before the six years had expired; and another sum of £12,000 in building a mansion-house.

The Crown claimed from the trustees legacy duty at 5 per cent. upon the capital of the whole residue of the movable estate:—

Held, affirming, but not on the same grounds, the judgment of the Court of Session (19 Court Sess. Cas. (Rettie), 461) that the Crown was entitled to the duty, for, first, the words "shall become entitled to an estate of inheritance in possession in real estate," must be taken to apply to a person who would become entitled if real estate were purchased, to an estate of inheritance therein; and W. H. D. was in that position, for, if land had been purchased, he could have claimed a conveyance to himself which would have vested in him an estate of inheritance in possession; secondly, the compensation paid to the three next heirs of entail did not fall to be deducted before the duty was paid; and, thirdly, neither did the sum of £12,000 expended on building a mansion-house, that not being a specific purchase of land.

Per Lord Herschell, L.C.: That W. H. D. (if it were necessary to decide the point) was liable under the latter part of sect. 12.

APPEAL from judgments of the First Division of the Court of Session, Scotland (1).

The questions raised were whether, as maintained by the Crown, represented by the respondent, the clear residue of the personal estate, consisting of personalty to the extent of nearly £350,000, of the late Alexander Dunlop of Doonside, whose trustees the appellants were, was liable to duty under the Legacy Duty Acts

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(1) 19 Court Sess. Cas. 4th Series (Rettie), 461.

H. L. (Sc.)
1894
MACFARLANE
v.
LORD ADVOCATE.

(36 Geo. 3, c. 52, ss. 12 (1) & 19 (2); 55 Geo. 3, c. 184, s. 2), calculated at the rate of 5 per cent. upon the capital, in respect of

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(1) Sect. 12 of 36 Geo. 3, c. 52, provided: "And be it further enacted that the duty payable on a legacy or residue, or part of residue, of any personal estate given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession who shall be chargeable with the duties hereby imposed at one and the same rate shall be charged upon and paid out of the legacy or residue or part of residue, so given, as in the case of a legacy to one person. And where any legacy or residue or part of residue shall be given to or for the benefit of or so that the same shall be enjoyed by different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates so that one rate of duty cannot be immediately charged thereon all persons who under or in consequence of any such bequest shall be entitled for life only or any other temporary interest, shall be chargeable with the duty in respect of such bequest in the same manner as if the annual produce thereof had been given by way of annuity. And such persons respectively shall be so chargeable with such duty, and the same shall be payable when they shall respectively become entitled to and begin to receive such produce, and shall be paid by equal portions during the aforesaid terms of four years, if they shall so long continue to receive such produce. And where any other partial interest shall be given or shall arise out of such property so to be enjoyed in succession, the duty on such partial interest shall be charged and paid in the same manner as the duty is hereinbefore directed to be charged and paid in like cases of partial interests charged on any property given otherwise than to different persons in succession; and all and every person or persons who shall become absolutely entitled to any such legacy or residue or part of residue, so to be enjoyed in succession, shall when and as such person or persons respectively shall receive the same or begin to enjoy the benefit thereof, be charged with and pay the duty for the same, or such part thereof as shall be so received, or of which the benefit shall be so enjoyed in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed, or in such manner that the same shall be enjoyed in succession."

(2) Sect. 19 enacted: "That any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with and pay duty as personal estate; unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof after the same shall have been actually applied in the purchase of real estate for so much thereof as shall have been so applied: Provided, nevertheless, that in case before the same or some part thereof shall be actually so applied, any person or persons shall become entitled to an estate

the succession of his nephew, William Hamilton Dunlop, or whether, as contended for by the appellants, duty was only payable calculated by way of annuity on the life interest taken by W. H. Dunlop as heir of entail under the will of the late Alexander Dunlop. The second question was whether, if legacy duty was due upon the whole capital, the sum of £81,960, being the agreed price of the consent of the three next heirs of entail, sons of W. H. Dunlop, to the disentail, ought to be deducted from the sum liable to duty. The third question was, whether in the same event of the Crown's claim being correct, the sum of £12,000 expended by the trustees in building the mansion-house of Doonside before the expiration of six years mentioned in the testator's will fell to be deducted from the sum liable to duty.

The testator, Alexander Dunlop, died on the 30th of September, 1883, leaving a trust disposition and settlement, and, as stated, the appellants were his trustees, acting under this disposition.

By the 5th purpose of the testator's trust disposition and settlement, the trustees were directed to retain and accumulate the whole rents, interests, profits and proceeds of the residue and reversion of his said means and estate above conveyed, for and during the period of six years after his decease, and to apply the funds accumulated: 1st. In payment of £800 per annum during the said period of six years to William Hamilton Dunlop, solicitor, Ayr, the institute of the entails hereinafter mentioned, whom failing to the heir of entail for the time being who should be entitled to succeed under the destination thereinafter expressed to the lands and others to be entailed as thereinafter directed. 2nd. In payment of the whole duties to Government and other expenses connected with the trust; and 3rd. In building and

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of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase." Sect. 2 sch. pt. 3 of 55 Geo. 3, c. 184, is the taxing section, &c., now in force in place of sect. 2 of 36 Geo. 3, c. 52.

erecting at Doonside during said period a mansion-house with offices and lodges, and in laying out a garden, &c., for the institute and the heirs of entail succeeding to the said lands and others at an expense of not exceeding £12,000.

By the 6th purpose the trustees were directed during the period of six years to sell and realize the whole of the residue and reversion of the movable estate of every kind of the testator, and the whole of his heritable bonds, feu-duties, and ground annuals, and his house and other heritable property in Glasgow and out of the United Kingdom, with certain specified exceptions; and his trustees were to look out for and purchase with the proceeds of the said residue and reversion such lands or landed estate or estates in Scotland as they might consider proper, and entail the same and his other landed estates as aftermentioned: Declaring, however, that if after such purchases were completed there should remain a balance which could not conveniently be invested in land they were to lay out the same either in improvements on the lands so purchased, or on the purchase of furniture, or pay it over to the institute or the heir of entail then in possession: Declaring, however, that although it was his wish and desire that his trustees should realize the residue and reversion of his estates, and purchase the said lands or estates during the said period of six years, they might use their own discretion, and delay the purchase of landed estate until after the expiry of six years, in which case the residue of the whole heritable and movable estate was after the expiry of the said period to be paid to the heir of entail aforesaid.

By the 7th purpose, the trustees were directed to execute, as soon as convenient after the said period, a deed or deeds of strict entail of the lands and estates to be purchased as aforesaid; and also of other lands and estates of Doonside, Doonbank, Brockloch, Carwinshake, Carnduff, Dalwhinnie, and other properties which might belong to him at his death, excepting those which were directed to be life-rented or to be sold and realized, to and in favour of William Hamilton Dunlop, solicitor, Ayr, and the heirs male of his body, lawfully begotten, according to their seniority, and the heirs male of their bodies, lawfully begotten, according to their seniority, whom failing, to Hamilton Dunlop and his same series of heirs, whom all failing, to the testator's own nearest heirs.

William Hamilton Dunlop survived the period of six years, which expired on the 30th of September, 1889. During the six years the trustees expended the sum of £12,000 in the erection of the mansion-house of Doonside, directed by the 5th purpose of the will, and had also expended £21,015 in purchase of the estate of Sauchrie in implement of the 6th purpose.

On or about the 6th of June, 1890, the appellants lodged with the Inland Revenue a residuary account of the whole movable estate in their hands as at the 30th of September, 1889. The said accumulated estates amounted to £347,631, and legacy duty calculated thereon by way of annuity amounted to about £8736.

The appellants paid an instalment amounting to £2223 on account of this duty on the 14th of June, 1890. They were afterwards informed that, in the event of the said W. H. Dunlop obtaining a decree in a petition which he had presented to the Court of Session for authority to disentail and acquire the movable estate and accumulations in fee simple, a claim for duty at 5 per cent. upon the capital would be made under sect. 19 of the Act of 36 Geo. 3, c. 52, which duty amounted to a sum of about £17,500, with interest (31 & 32 Vict. c. 124, s. 9) from November, 1890; and this was the claim eventually made. W. H. Dunlop's petition to acquire the property in question in fee simple had been presented in January, 1890, and on the 22nd of November, 1890, the Court granted the prayer of the petition, and by interlocutor of that date ordered the trustees to make over to W. H. Dunlop, his heirs and assigns, in fee simple the lands and estates mentioned in the petition, and any other heritable property and estate belonging to the trust, and the whole of the personal property specified in the schedule appended to the petition, and any other personal property and estate vested in them, with the exception of £20,000 to meet payment of annuities and £20,000 to pay the duties payable to the Crown, and any other liability incurred by the trustees in executing the trust. Before W. H. Dunlop could obtain the authority of the Court contained in the above-mentioned interlocutor, it was necessary for him to obtain the consent of the three next heirs of entail, his sons, and as they were in minority a separate curator ad litem was appointed to each; and it appeared that the values of the interests of these three next heirs in the whole trust property to be acquired in fee simple, including the heritable property, were ascertained to be respectively £89,145, £10,000, and £1350. The proportions of these sums representing the value of the expectancies of the three heirs in the personal property alone were £72,700, £8160, and £1100, or £81,960, representing the interests of the three next heirs applicable to the personalty.

The decree of the 22nd of November, 1890, having been pronounced, the claim of the respondent to duty calculated at the rate of 5 per cent. on the capital was presented.

On the 4th of December, 1891, the Lord Ordinary (Wellwood), pronounced a judgment interlocutor, finding that William Hamilton Dunlop, having become entitled absolutely to the clear residue of the personal estate of the deceased Alexander Dunlop, duty was chargeable on the capital thereof at the rate of 5 per cent., and repelled the defences lodged by the appellants, and appointed the cause to be proceeded with to ascertain the balance due to the Crown. By this judgment his Lordship disposed of the further or second contention of the appellants, deciding that the compensation agreed to be paid to the three next heirs should not be deducted.

On the 5th of February, 1892, the First Division adhered (1).

In adjusting the account the Crown objected to two deductions, namely, £21,015, the price of the estate of Sauchrie purchased by the trustees on the 11th of November, 1885, and £12,000 expended on building a mansion at Doonside in accordance with the testator's directions.

On the 13th of June, 1893, the Lord Ordinary (Wellwood) repelled both objections. But on the 12th of January, 1894, the First Division recalled the Lord Ordinary's interlocutor so far as regards the £12,000, holding that sum not to be a valid deduction from the personal estate (2). The Crown lodged no cross-appeal as to the £21,015. The appellants' third point in the appeal was the non-allowance of the deduction of £12,000 expended on the mansion-house.

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(1) 19 Court Sess. Cas. 4th Series (Rettie), 461.

(2) 21 Court Sess. Cas. 4th Series (Rettie), 348.

On appeal,

May 31; June 1. Sir *R. Webster*, Q.C., and *Henry Johnston*, with them *J. C. Pitman*) (the two latter of the Scotch Bar), for the appellants.

The Court of Session has decided that W. H. Dunlop became entitled to the whole of the property under the will in question, and is therefore liable to pay duty upon the capital value. But, having regard to the true construction of the Legacy Duty Act (36 Geo. 3, c. 52, ss. 12, 19), he did not become possessed of an estate of inheritance; in other words, of fee simple by operation of the will. He obtained it by a purchase and sale between himself, the tenant in tail and the remainderman, by virtue of the law relating to entails. It was by virtue of the interest W. H. Dunlop took under the will that he was enabled to buy up the interests of those who presumptively would have succeeded him; but this did not bring him within the operation of 36 Geo. 3, c. 52. It was not one of the events contemplated in the Act as giving rise o an estate of inheritance. Under sect. 12 "becoming entitled" has nothing to do with becoming entitled to a certain sum of money by virtue of the disentailing proceedings. See *Lord Lilford* v. *Attorney-General* (1); and in *Mules* v. *Jennings* (2) it was laid down that the tax would not be affected by an act of the person entitled, which act did not depend on the will of the testator. Until the disentailing deed sect. 12 would be applicable, and all that W. H. Dunlop ought to pay is duty calculated on the basis of his having a life interest. The subsequent operation of the disentailing decree cannot turn what was not at that time an estate of inheritance into an estate of inheritance. Suppose W. H. Dunlop satisfied the duty payable under sect. 12, and after twenty years acquired the estate in fee simple under the Entail Acts, then, if the judgment of the Court of Session was correct, another duty on the capital value became payable.

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(1) Law Rep. 2 H. L. 63.

(2) 8 Ex. 830.

[LORD MACNAGHTEN:—W. H. Dunlop is liable under sect. 19, not under sect. 12. Sect. 12 deals with estates for life only and other temporary estates; but W. H. Dunlop was entitled to an estate of inheritance in possession in the lands to be purchased, and not the less so because he would take the whole fee.

LORD HERSCHELL, L.C.:—It may be that both sections apply, because the will created an estate of inheritance quite apart from the disentailing deed, and that puts an end to the case.

LORD MACNAGHTEN mentioned *De Lancey* v. *Reg.* (1).]

It does not appear to have occurred to the judges in the Court of Session that there was an "estate of inheritance" in W. H. Dunlop before the disentail. "Estate of inheritance" is a term absolutely unknown to the law of Scotland, and the meaning of the statute can only be ascertained by analogy.

[LORD WATSON:—*Lord Saltoun* v. *Advocate-General* (2) decided that one must if possible read the words of a general taxing Act so that they will have the same effect in England as in Scotland.]

The Court of Session considered an estate of inheritance to mean an estate which would or could pass to a man's natural heirs or his right heirs, and not to heirs dictated to him by another, because under an estate tail you may have an heir brought in who is not an heir connected with the first taker or institute—that is, an heir created by the nomination of the testator.

According to English law, the tenant in tail would undoubtedly take an estate of inheritance; but W. H. Dunlop would be spoken of in England as the tenant for life.

On the second point. Of course where the duty is paid out of residue, the interest of all the takers would be less in proportion.

On the third point. The £12,000 laid out by the trustees in building a house is money laid out by them on land; for if a house already built had been purchased, it would unquestionably have been a purchase of land; and what is the difference between saying to a man, "Build me a house, and I will buy it," or "Build me a house on this estate"?

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(1) Law Rep. 4 Ex. 345; 5 Ex. 102; 6 Ex. 286; 7 Ex. 140.

(2) 3 Macq. 659.

[LORD MACNAGHTEN:—The words are very specific—"applied in the purchase of real estate." The principle suggested in such cases as *Caldecott* v. *Brown* (1), and *Re Barrington's Settlement* (2), does not apply.]

The Lord Advocate (*J. B. Balfour*, Q.C.) (with him *The Solicitor-General for Scotland* (*T. Shaw*, Q.C.), and *Patten-MacDougall*, all of the Scotch Bar) for the Crown:—

[He was asked to address himself only to the effect of the proviso to sect. 19.]

An estate of inheritance means an estate descendible to heirs. An entail may be limited to a certain line, or the line may be a different line in each case; but as it is descendible to heirs, it is an estate of inheritance. And what is called paying for the interest of the subsequent heirs when there is a disentail is truly paying for nothing more than the surrender of an expectancy: for there is no present interest in them. Under the proposed entail here no heirs would pay a different rate of duty, as the entail would end upon failure of heirs of the body of the brother Hamilton Dunlop. Besides, here the trustees have a sum of £20,000 set aside to pay duties.

LORD HERSCHELL, L.C.:—

The question raised by this appeal is whether the Crown is entitled to legacy duty upon the residue of the estate of the testator, who died in the year 1883, having made a trust disposition by which the income of his estate or part of it was to be accumulated for a period of six years, and then to be laid out in the purchase of land by the trustees, the land purchased being settled as soon as convenient after the expiry of the six years by the trustees executing a deed or deeds of strict entail of the lands purchased, "to and in favour of William Hamilton Dunlop and the heirs male of his body lawfully begotten according to their seniority," whom failing the heirs female of his body lawfully begotten, whom failing to his brother Hamilton Dunlop and the heirs male and female of his body lawfully begotten, with an ultimate provision, failing those heirs, to the testator's own nearest heirs and assignees whomsoever.

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(1) 2 Hare, 144.

(2) 1 J. & H. 142.

The moneys forming part of the residue, the duty upon which is now claimed, had not at the time in question been applied in the purchase of land; they were still in the hands of the trustees. A residuary account was sent in by the trustees, and William Hamilton Dunlop, who would have been interested under the deed of entail if executed, took proceedings, as he was entitled to do under the Acts which enable a disentail to be effected, by which the interests of the three next heirs were to be ascertained and valued, and, subject to those interests so valued, he became entitled to the residue without the money being expended upon the purchase of land, and settled in the manner provided by the trust disposition. There is no dispute that it was perfectly competent to William Hamilton Dunlop to take this course—that it was one which the law sanctioned, and that the effect of his having taken it was that which I have described.

The Crown claims the duty upon the whole of this residue, under the provisions of the 36th of Geo. 3, c. 52, or the provisions which have been substituted for it, but which do not materially alter those enactments. The statute in the first instance imposes legacy duty upon all legacies above a certain amount and upon all residue or share of residue which may pass to a beneficiary under a will. In the 12th clause, upon which reliance is placed by the appellants, it is provided: "That the duty payable on" "residue or part of residue of any personal estate" (it applies to legacies also, but as this is a case of residue, it is not necessary to refer to that part) "given to or for the benefit of or so that the same shall be enjoyed by different persons in succession who shall be chargeable with the duties hereby imposed at one and the same rate shall be charged upon and paid out of the residue or part of residue so given as in the case of a legacy to one person." So that even where successive interests are created by the trust disposition, if the persons entitled to those successive interests are of the same degree of consanguinity so that the duty would be payable at the same rate, the duty is to be paid out of the residue just as if there had been a bequest to one person alone.

The next part of the section deals with the case where a legacy or residue or part of residue is "given to or for the benefit of or so that the same shall be enjoyed by different persons in succession some or one of whom shall be chargeable with no duty or some of whom shall be chargeable with different rates of duty so that one rate of duty cannot be immediately charged thereon." It was to meet that particular case that a departure was permitted from that which is the principle of the Act clearly indicated by the 2nd section and the earlier part of the 12th section, that where there was a bequest of residue the duty should primâ facie be paid out of that residue on the whole sum which would pass from the trustees to the beneficiary, before distribution. In the case where different rates of duty would become chargeable there was of course a difficulty in providing for that course being adopted; and, therefore, where persons under such a settlement became entitled for life only or to a temporary interest, they were to be "chargeable with the duty" "in the same manner as if the annual produce had been given by way of annuity." But the section concludes by providing that "all and every person and persons who shall become absolutely entitled to any such legacy or residue or part of residue so to be enjoyed in succession shall when and as such person or persons respectively shall receive the same or begin to enjoy the benefit thereof be chargeable with and pay the duty for the same or such part thereof as shall be so received or of which the benefit shall be so enjoyed in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed." So that the scheme of the section was that where you could only charge in succession you were to do so; but in that case whenever any person or persons became entitled to an absolute interest, then the duty was to be paid upon the whole sum.

That is followed by sect. 19, which deals with the class of cases which this House has now to consider. It enacts: "That any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with and pay duty as personal estate." That is the leading idea of the section. Then it continues: "Unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued." The word "unless" with which that provision commences is certainly not very happily chosen, because the enactment first being that the sum of money to be applied in the purchase of real estate shall be charged with the same duty as personal estate, the word "unless" would seem the proper mode of introducing some exception; but the words which follow "unless" do not introduce any exception at all; on the contrary, they provide that where the property is to be enjoyed by different persons in succession, the duty is to be paid in the same manner as if it had not been directed to be applied in the purchase of real estate. That refers to the cases dealt with by sect. 12.

Then the section proceeds to say: "but no duty shall accrue in respect thereof, after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied: Provided nevertheless that in case before the same or some part thereof shall be actually so applied any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith or with so much thereof as shall not have been applied in the purchase of real estate the same duty which ought to be paid by such person or persons if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons and raised and paid out of the fund remaining to be applied in such purchase."

It is not disputed that if the case is within the proviso which I have just read, the appeal must fail and the judgment of the Courts below must be affirmed. The question is whether the residue had been actually applied in the purchase of land before the person "became entitled to an estate of inheritance in possession in the real estate to be purchased therewith." At the time when this dispute arose the money had not been applied to the purchase of land at all, but remained as money in the hands of the trustees. It is obvious that the words "in case any person or persons shall become entitled to an estate of inheritance in possession in the real estate" cannot be literally applied, because no person can become entitled to an estate of inheritance in possession in real estate which is to be purchased in the future. It is obvious that the words need construction, and that their meaning must be, in case a person will become entitled if real estate is purchased, or as and when real estate is purchased, to an estate of inheritance in possession therein.

Now, was Mr. William Hamilton Dunlop in the present case in that position? Supposing the land had been purchased, could he have claimed a conveyance to himself which would have vested in him an estate of inheritance in possession? Now, the land which was to be purchased was to be conveyed and settled to and in favour of William Hamilton Dunlop, and the heirs male of his body lawfully begotten, with other provisions to which I have already called attention. Was the estate which undoubtedly would have been vested in him if the land had been so settled an estate of inheritance in possession? The words "an estate of inheritance" are, I understand, not words of art in the law of Scotland. One has to consider their meaning, therefore, without reference to any technical rule. Is a person who is instituted heir of entail the owner of or possessed of an estate of inheritance? My Lords, as far as I understand the law of Scotland, the heir of entail is the owner of the land. That land will descend to the heirs under the entail, and the limitations upon his ownership are fetters introduced for securing that the land shall descend to the heir. Under those circumstances it certainly appears to me that when one once arrives at what the position of an heir of entail is, there is no difficulty in coming to the conclusion that a person enjoying such rights and having such a title and such ownership does possess an estate of inheritance. Indeed, it seems to me difficult to define an estate of inheritance better than as an estate which does not terminate with the life of the possessor, but which passes to his heirs. It is quite clear that a tenant in tail in England according to the English law is possessed of an estate of inheritance; and it is equally clear that the position of an heir of entail in Scotland and that of a tenant in tail in England do not, for any practical purposes in view of the question of their possessing an estate of inheritance, differ in quality the one from the other. I do not of course mean to say that the rights of a tenant in tail in England and of an heir of entail in Scotland are precisely the same; they are not; but in considering whether it should be said of the one as of the other that he possesses an estate of inheritance, it seems to me that every reason which makes that language appropriate in the one case makes it appropriate in the other. For myself, therefore, I own it seems to me that, quite apart from the disentailing proceedings effected by Mr. William Hamilton Dunlop, his case comes within the proviso, and that the intention of the proviso was to meet such a case, and that where a person under a trust disposition would have taken such an estate if the land had been purchased as Mr. Dunlop would have taken in the present case, he should be treated for the purposes of the legacy duty as the absolute owner just as much as if the bequest had been made to him absolutely.

That really is sufficient to dispose of the present case. But even if that view were not well founded, I should not be satisfied by the arguments of the learned counsel for the appellants that they would be entitled to judgment. The effect of the statutes in reference to disentailing is to enable the first heir of entail to have the interest or expectancies of the three next heirs, in circumstances such as the present, valued, and to insist that, instead of the entail continuing and instead of the land being purchased and settled in the manner prescribed, they according to their several interests shall have paid over to them or be entitled to enjoy the money which was destined by the testator to be laid out in land. Where such a disentail has taken place it is obvious that all succession or idea of succession is at an end. The money in the hands of the trustees is no longer to be settled; there is no longer to be a succession of interests, or any land to be purchased; there will be an absolute title to have that money handed over free of restriction. How under those circumstances ought it to be dealt with for the purposes of legacy duty? My Lords, it is not necessary to express any opinion upon that after the view which I have invited your Lordships to take upon the effect of the proviso; but I own it seems to me that there is no difficulty in such a case in applying the language of the 12th section of the Act or, if that be inappropriate, even of the 2nd section of the Act, which is the charging section. If it is not a case of succession at all, then the 2nd section applies. The 12th section only comes in where successive interests have been created and have to be dealt with. Of course, if sect. 2 applies, or that which is now substituted for it, there is an end of the case. If sect. 12 applies, then under the earlier part of the section the case does not differ. The whole argument has been based upon the suggestion that the case is one of successive interests within the second part of sect. 12, and that therefore all that Mr. William Hamilton Dunlop ought to do is to pay upon the basis of his having a life interest. But, my Lords, all those successions, whatever they were, which were intended to be created by the testamentary disposition were created subject to the law relating to entail; they were created subject to a statutory power of sweeping them away, and the result of their being swept away, is that there are now no successive interests which can be charged, but that there are absolute interests, and absolute interests only, in the money. I certainly have no difficulty in applying to those circumstances the language at the end of sect. 12, which provides that although there were to be successive interests, yet whenever the successive interests come to an end, and there is an absolute title in some person or persons, then the duty shall be paid in the manner provided at the end of that section. It is not, however, necessary to come absolutely to any determination upon that point, because the case is really concluded against the appellants by the view which I first presented to your Lordships.

Your Lordships in the course of the argument indicated somewhat clearly that the other point taken by the appellants was wholly untenable, the question being whether money which was expended in building a house upon land can be treated as coming under the words "purchase of real estate." It seems to me that notwithstanding the argument used for the purpose of shewing that the result is the same as if the land with the house on it had been purchased and that it is hard that the incidence of the tax should be different, it must be remembered that in construing a taxing statute such as this your Lordships have to be guided by the words used, and it would be doing them violence almost amounting to an outrage if the words were held to cover such a case as that under consideration.

I therefore move that the interlocutors appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON :—

My Lords, whatever view be taken of this case, whether it be regarded as one in which nothing ought to be looked at except the terms of the trust deed of the late Mr. Dunlop, or whether it be assumed that the fact of the disentail with all its consequences ought to be taken into account, the result to the appellant appears to me to be precisely the same.

With regard to the first of these views, I entertain the opinion that according to Scotch law the expression "estate of inheritance" occurring in the proviso to the 19th section of the Act of 36 Geo. 3 ought to be construed as including the right and interest of a Scotch heir of entail in possession. The words are not technical, but they appear to me very aptly to describe that right and interest. A Scotch heir of entail in possession is vested with the full fee of the land. He is the only person who can have the slightest pretence to the position of owner; and the sole object of the restrictions, imposed upon him as taillied fiar, is to protect and strengthen the right of inheritance which is created by the deed of entail, and to make the estate descend in succession to those heirs who are called by the terms of the destination.

But, my Lords, this is a taxing statute applicable equally to real estate in Scotland and in England; and, following the principles which were laid down by the noble and learned Lords who decided *Lord Saltoun* v. *Her Majesty's Advocate-General* (1), it is clear that if the interest of an heir of entail can by any fair interpretation be brought within the words "estate of inheritance," it ought to be so brought. I need hardly repeat that in England the interest of a tenant in tail which bears, I

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(1) 3 Macq. 659.

Lord Watson.

will not say a close, but a fair analogy to the interest of an heir of entail in Scotland, would clearly fall within the sweep of the Act. According to that view Mr. Dunlop, before he presented the petition of disentail, was within the predicament of the proviso, and was liable to be assessed simply as if he had been a legatee. I have had some difficulty in making up my mind whether that is the right ground upon which to rest the decision of this case, or whether the alternative view which has been presented is the right one. If the disentail is to be taken into account that must be upon the footing that the Legislature has by the provisions of the Entail Acts altered and modified the meaning and effect of such a direction to invest and entail as occurs in the settlement of the late Mr. Dunlop. In that view, the result of entail legislation, beginning in 1848 and terminating in the year 1882, has been to prescribe that a direction in these terms shall, in the circumstances which have occurred in the present case, not operate according to its precise terms, but as an absolute bequest to the institute of entail and to certain other of the heirs. It seems to me to be very immaterial whether the case falls under the proviso or condition in the end of sect. 12 of the statute or under the general taxing words of the Act as a direct bequest of residue to these persons.

My Lords, I have only to say in addition that the Court of Session appear to have erred in assuming that if the last view be the correct one the case would be within the proviso at the end of sect. 19. I do not think that that is so; I think the proviso at the end of sect. 19 is confined to the case where the money is not to be paid over but is to be invested by the trustees, and land is to be conveyed to the beneficiaries indicated in the deed. I am bound to say, however, that the error has been mainly if not wholly induced by the form in which the Crown chose to present its case for the consideration of the Court.

LORD ASHBOURNE, concurred.

LORD MACNAGHTEN:—

I agree. Putting aside the disentailing proceedings and the rights flowing therefrom I think this case clearly falls under

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sect. 19 of the 36th of Geo. 3. I think the words in the proviso at the end of that section, though not framed in the technical language of the Scotch law, describe the actual position of William Hamilton Dunlop, as institute of the entail created under the testator's trust disposition, as aptly and as accurately as they would describe the position of a tenant in tail in possession in England.

LORD MORRIS, concurred.

LORD SHAND:—

I also concur, and I am of opinion with your Lordships that this decision should be affirmed upon the grounds stated by my noble and learned friend the Lord Chancellor and my noble and learned friend opposite (Lord Watson). I desire to add, however, that I am not satisfied that the judgment of the learned judges in the Court of Session, rested as it is upon the proviso in sect. 19, is not sound and sufficient for the decision of the case.

LORD RUSSELL of KILLOWEN, concurred.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Lords' Journals, June 1st, 1894.

Agents for appellants: *Grahames, Currey, & Spens, for J. & F. Anderson, W.S., Edinburgh.*

Agents for respondent: *Sir W. H. Melvill, Solicitor for England of the Inland Revenue, (Mr. Mudie) for P. J. H. Grierson, Solicitor for Scotland of the Board of Inland Revenue, Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1894
June 4.

HAMILTON . . . . APPELLANT;

AND

RITCHIE AND ANOTHER . . . . RESPONDENTS.

Succession—Vesting—Substitution—General Disposition—Scotch Law.

Where a lay testator who writes his own will uses words which have an intelligible conventional meaning, he is not to be held as having used the words with any other meaning, unless the context of the instrument shews that he intended to do so.

Where a will gives an unqualified bequest of land, making no reference to the time at which it is to operate, the gift takes effect a morte testatoris, except where that date would disturb any of the provisions already made in the will, or where the testator has clearly indicated that he did not intend it to operate until a later period.

A testator, by his will, gave the life-rent of his entire estate, heritable and movable, to his wife, who survived him. The will proceeded: "I also leave to my nephew," W., the estate of Bankhead; "but I wish it expressly understood that in the event of my said nephew," W., "dying without leaving any lawful male heir of his body, then, and in that event, my said lands of Bankhead are to revert back to my nephew," H.

The nephew W. survived the testator, but died unmarried before the testator's widow. W. left a general disposition disposing of all estate which might belong to him. On the widow's death, the nephew H. claimed Bankhead:—

Held, affirming the decision of the Court of Session (21 Court Sess. Cas. 4th Series (Rettie), 451), that the estate of Bankhead had vested in W. a morte testatoris, and that it was conveyed to W.'s trustees by his general disposition.

APPEAL from a judgment, dated the 31st of January, 1894, of the Second Division of the Court of Session, Scotland (1) (Lord Young dissenting), adhering to a judgment of the Lord Ordinary (Low). This appeal is the sequel to the case of *Whyte* v. *Pollok* in this House in 1882 (2), when the validity of a document headed "Notes of intended Settlement by Walter Whyte of Bankhead," the testator, was established. The report of that

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(1) 21 Court Sess. Cas. 4th Series (Rettie), 451.

(2) *Whyte* v. *Pollok*, 7 App. Cas. 400.

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appeal gives the full text of the will, and the particular clauses giving rise to this appeal will be found in the judgment of Lord Watson. It need only, therefore, be stated here that the appellant was John Andrew Hamilton (called by the testator John Hamilton), defender in an action, raised at the instance of the respondents, trustees of the deceased James Francis Watson, and the questions for decision were: First, whether under the holograph will or notes of settlement in question of the testator Walter Whyte, who died in 1880, his nephew, James Francis Watson, who died in 1883, became entitled a morte testatoris to the fee of the estate of Bankhead; or whether, as the appellant contended, vesting of the fee was postponed until the death of the life-rentrix, the testator's widow, who died in 1892, in which case James Francis Watson, having predeceased the life-rentrix without issue, the fee of Bankhead would be carried to the appellant, also a nephew of the testator, under an ulterior destination in the testator's will. Secondly, whether any right to the estate of Bankhead which the testator intended James Francis Watson should take was not conditional on his leaving a male heir of his body, and was limited to a life-rent or fiduciary fee. Thirdly, whether, on the assumption that the fee of Bankhead did vest in James Francis Watson, the terms of James Francis Watson's will, under which the respondents act, were sufficient to pass the estate, or in other words, were sufficient to evacuate the ulterior destination in Whyte's will in favour of the appellant. By his will James Francis Watson conveyed to his trustees, the respondents, his whole means and estate, heritable and movable, &c., at present belonging or that might belong to him at the time of his decease, including all estate, &c., over which he had a power of disposal.

On appeal,

June 1, 4. *J. Fletcher Moulton*, Q.C., and *C. K. Mackenzie* (of the Scotch Bar), for the appellant, cited on the first point *Young* v. *Robertson* (1); Lord Colonsay in *Carleton* v. *Thomson* (2);

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(1) 4 Macq. 314.

(2) Law Rep. 1 H. L., Sc. 232; 5 Court Sess. Cas. 3rd Series (Macpherson), (H.L.), 151.

Ramsay v. *Beveridge* (1); and on the third point, *Campbell* v. *Campbell* (2); *Catton* v. *Mackenzie* (3).

A. Graham Murray, Q.C. (of the Scotch Bar), and *J. G. Butcher*, appeared for the respondents, but were not called upon.

LORD WATSON:—

This appeal raises a question upon the construction of a clause in the settlement of the late Mr. Walter Whyte of Bankhead. The general scheme of that instrument is that Mr. Whyte, upon his death, which occurred in 1873, gave the life-rent of his entire estate, heritable and movable, to Mrs. Margaret Pollok, or Whyte, his spouse, who survived him. The interest of the widow was burdened by an annuity of £300 in favour of Mrs. Hamilton, one of the testator's sisters. After that bequest he provides that on the death of his wife the annuity to Mrs. Hamilton is to cease, and that in lieu of that annuity she is to take a life-rent of two properties which are destined, one to her son John, the appellant in this case, and the other to her son James Hamilton in fee. I do not think it has been seriously disputed that the fee which is destined to the two Hamiltons vested in them a morte testatoris.

Then follows the clause which we have to construe. That, again, is followed by a direction that at the death of his widow his movable estate shall be equally divided between the families of his two sisters, Mrs. Watson and Mrs. Hamilton.

The clause which has given rise to the present litigation is in these terms: " I also leave to my nephew, James Francis Watson, presently residing at Ardmore House, in the parish of Cardross, Dumbartonshire, my estate of Bankhead, situated in the parish of Rutherglen and county of Lanark; but I wish it expressly understood that in the event of my said nephew, James Francis Watson, dying without leaving any lawful male heir of his body, then, and in that event, my said lands of Bankhead are to revert back to my said nephew, John Hamilton."

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(1) 16 Court Sess. Cas. 2nd Series (Dunlop), 764, at p. 771.

(2) 5 App. Cas. 787.

(3) 8 Court Sess. Cas. 3rd Series (Macpherson), 1049.

The circumstances which have occurred are these: James Francis Watson survived the testator, but predeceased his widow, and when the widow's life-rent came to an end by her decease, the estate of Bankhead was claimed by the present appellant, upon the footing that James Francis Watson's predecease of the widow prevented his taking any interest whatever in the succession, and also that these words "then, and in that event, my said lands of Bankhead are to revert back to my said nephew John Hamilton," ought to be read, not as a clause of reversion intended to bring back an estate which had been taken during his lifetime by James Francis Watson, but as being intended to operate as a simple gift over upon the widow's death in the event of Watson having predeceased that term.

When the clause is taken by itself, nothing can be clearer to my mind than the intention of the testator. I do not say that a testator who writes his own will, and is not a lawyer, is in all cases to be held to have rightly apprehended the meaning of technical words which he may have used on the occasion of making his will; but I think it is plain that a testator who uses words which have an intelligible conventional meaning is not to be held as having used the words with any other meaning, unless the context of the instrument shews that he intended to do so.

In this case nothing can be more simple than this clause of the will. It commences with an unqualified bequest, making no reference to the time at which it is to operate, of the estate of Bankhead in favour of Watson. I need hardly say that where such a bequest occurs it must take effect a morte testatoris, except in one or the other of these two cases—namely, where to give effect to it from that date would disturb any of the provisions already made in the will, or where the testator has clearly indicated, either by express words or by plain implication, that he did not intend it to operate until a later period—the death of the widow.

Then, so far as regards the condition attached, introduced by the words, "I wish it expressly understood," they refer to one period, and one period only—the death of Watson; and upon his death, without mention of any other death or any other event which is to be taken into computation along with it, there is a provision that the property shall revert. I need not say that, in the absence of any context to control the meaning of these words, "revert back," they plainly point to the case where, a beneficiary having taken under the will, the estate which he took is not to descend to his heir-at-law, or to a person appointed by his will, but is to go back to some person favoured by the testator. Accordingly, in order to give the meaning to this clause which is requisite if the appellant is to succeed, I find from the very able and elaborate arguments which have been addressed to us by the learned counsel on his behalf, that it is absolutely necessary, in the first place, to discharge from the clause the ordinary meaning of some of the words which it employs; and, in the second place, to introduce into the clause words which are not to be found in it, and are not connected with it by reference to other parts of the deed. The gloss which they desire to put upon it, according to one of several constructions more or less plausible which they suggest, is, "I also leave to my nephew, James Francis Watson, at the death of my widow, my estate of Bankhead; but I wish it expressly understood that, in the event of my said nephew, James Francis Watson, dying during the life of my widow without leaving any lawful male heir of his body"; and when you come to the latter part of the clause, you are required to do this violence to the text, that instead of making the estate go back from one who has taken it already, it is to go to a substitute because the institute has failed to take.

These are very considerable alterations. I do not intend to refer to any other of the theories put forward; but they appear to me conclusively to shew that it is impossible to adopt the construction which has been suggested by the appellant, without doing extreme violence, in the first place, to the meaning of some words in the text; and, in the second place, by bringing in words from outside the instrument which are not to be found within it. After giving the life-rent of the entirety of his estate to his widow, the testator declares, "at the death of my wife said annuity to cease." It is perfectly plain that these words are introduced into that part of the text of the will for the purpose of indicating the time at which Mrs. Hamilton's annuity, chargeable upon the widow's life-rent, is to cease, and her new right as a life-renter of the lands which are given in fee to her sons is to begin. I cannot for a moment suppose that those words were intended to apply to all the subsequent clauses of the deed. I find that the remaining bequests are stated as distinct and substantive gifts, entirely independent of that reference to time as affecting the annuity of Mrs. Hamilton. And then, when he has concluded this destination of the estate of Bankhead to James Francis Watson, the testator proceeds to deal with the division of his movable estate; and, it being necessary to specify a time, he again introduces the words "at the death of my said wife my movable estate is to be equally divided."

Various theories of construction have been discussed, some of them not very much akin to the question which we have to decide in the present case. I think that the whole substance of the grounds upon which I am prepared to recommend your Lordships to affirm the judgment appealed from is to be found in a single sentence of Lord Rutherfurd Clark's opinion: "I think that it came into operation from the testator's death; there is no other time assigned."

I do not think it necessary to trouble your Lordships with any reference to that class of cases of which the most recent is *Glendonwyn* v. *Gordon* (1). It refers to a rule of the law of Scotland to the effect that a general conveyance is not in all cases held to carry estates settled by special destination. But the rule goes no further than this: that a general disposition will presumably carry all lands previously settled under a special destination, which the truster or testator has power to dispose of. In order to deprive his general disposition of that effect it is the duty of the litigant, who says that the special destination has not been defeated, to shew to the satisfaction of the Court, either by the terms of the testator's settlement or by other documents to which it is legally competent to refer, that it was not the intention of the testator to disturb the standing investiture.

I move that the interlocutors appealed from be affirmed, and the appeal dismissed with costs.

(1) Law Rep. 2 H. L., Sc. 317.

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The Lord Chancellor has requested me to state that he agrees with the conclusion at which your Lordships have arrived.

LORDS ASHBOURNE, MACNAGHTEN, and MORRIS, concurred.

LORD SHAND :—

I am also of the same opinion, and I venture only to add a few words in confirmation of what has fallen from my noble and learned friend (Lord Watson). The practical question in the case is whether under the testator's settlement vesting took place a morte testatoris or was postponed until the death of the life-rentrix. In the former case the only question that would remain is whether the property having so vested has been carried by the general trust-disposition and settlement of Mr. James Francis Watson. If there was no vesting until the death of the life-rentrix, confessedly the appeal must succeed.

Now, on the question of vesting, I have to observe in the first place that there is no trust here created. Though we have not technical words of conveyance, such as the word "dispone," or any word to that effect, there is a word, "leave," which is sufficient to convey the right; so that the will, in the words of Lord Rutherfurd Clark, was "a conveyance or equal to a conveyance." Then it is quite settled that the mere existence of a life-rent, or a direction that annuities shall be paid by a life-renter, has not the effect of suspending vesting. And finally there is no specification of any time in this deed other than the death of the life-rentrix as the period of vesting.

My Lords, I think that there are further circumstances which confirm the general view of the deed now stated. There are several properties here dealt with. It is admitted that in the case of John Hamilton, one nephew to whom certain lands are conveyed, subject to the widow's life-rent, the vesting is a morte testatoris. It is conceded that in the case of another nephew, James Hamilton, to whom other lands were conveyed, there was vesting a morte testatoris. There is every presumption that the same result should follow in the case of the third nephew, and indeed it is admitted that were it not for a few words beginning with the clause "but I wish it expressly understood," and so on, it is clear that there would have been vesting a morte testatoris in the case of James Francis Watson also.

I am unable to gather from the clause which has been founded upon that there was any suspension of vesting so long as the life-rent subsisted. As my noble and learned friend has pointed out, it is necessary to insert words in the deed in order to give it the effect which is contended for by the appellant. The words are, "I wish it expressly understood that in the event of my said nephew, James Francis Watson, dying without leaving any lawful male heir of his body." These words would naturally mean dying at any time without leaving any lawful male heir of his body, in which case this would be, as I think it is, simply the provision of a substitution. In order to give them any other effect you must add, "in the event of my said nephew, James Francis Watson, dying during the lifetime of the life-rentrix." There are no such words there, and I see no warrant for inserting such words.

But, my Lords, the remaining part of the clause seems to me, as it does to my noble and learned friend, to throw much light also upon this question of vesting, if anything further were needed, because that is a clause of reversion of the property —a declaration "that in the event of James Francis Watson dying without leaving any lawful male heir of his body the lands of Bankhead are to revert back." The conception of that clause is that the lands had first vested in James Francis Watson, and that from him they were to revert or descend to some one else. That, I need not say, is a strong confirmation of the view which I think is to be found generally throughout the deed as a whole, that the vesting was to be a morte testatoris. It is no doubt true, as was observed by Lord Young, that the testator contemplated a distribution of his personal estate on the death of the life-rentrix; but, with great deference to his Lordship's opinion, I do not think that any further distribution of the heritable estate was provided for beyond that which occurs in the ordinary case of a life-renter and fiars, in which case the life-renter's right is merely a burden on the fee, though the fiars' right to a beneficial possession arises only on the life-renter's death.

My Lords, with regard to the second branch of the case, I agree with what has been said by my noble and learned friend (Lord Watson) as to the effect of the trust disposition and settlement of James Francis Watson, the general terms of which were clearly sufficient to convey the lands now in question.

LORD RUSSELL of KILLOWEN, concurred.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, June 4, 1894.

Agents for appellant: *Grahames, Currey, & Spens, for Campbell & Smith, S.S.C., Edinburgh.*

Agent for respondents: *Andrew Beveridge, for Webster, Will, & Ritchie, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1894
June 5.

PALMER . . . . APPELLANT;

AND

WICK AND PULTENEYTOWN STEAM SHIPPING COMPANY, LIMITED . . } RESPONDENTS.

Negligence—Damages—Joint Delinquents—Joint and several Decree against both—Action by Payee of the whole Damages for Contribution from the co-Debtor.

The appellant, a stevedore, was engaged in discharging pig-iron from the respondents' ship when one of his workmen was killed by the fall of a block, part of the ship's tackle. The family of the deceased brought actions, which were conjoined, against the respondents and the appellant, alleging against the former the supplying of weak tackle, and against the latter reckless negligence in the use of the same. The jury found both defenders liable, and assessed the total damages at £600. The Court applied the verdict by a decree against the appellant and respondents jointly and severally for the full amount of the damages, and costs for which also they gave a joint and several decree. The respondents paid both demands, and took an assignation to the decrees. The appellant having refused to pay his moiety on the ground that he and the respondents being joint wrongdoers they had no claim of relief:—

Held, affirming the decision of the Court of Session (20 Court Sess. Cas.

4th Series (Rettie), 275), that the appellant was liable, the foundation of the respondents' claim resting on a decree which created a civil debt.

Merryweather v. *Nixan* (8 T. R. 186) is not founded on any principle of equity and ought not to be extended.

APPEAL against a judgment of the Second Division of the Court of Session, Scotland, reversing a decision of the Lord Ordinary (Wellwood) (1).

This action was raised at the instance of the Wick and Pulteneytown Steam Shipping Company, the respondents, against George Palmer, a stevedore, the appellant, for payment of a moiety of a sum of £600 awarded jointly and severally against the appellant and respondents as damages for the death of a workman engaged by the appellant in unloading the respondents' ship, and also for half of the costs awarded against them in the same terms. These sums the respondents had paid in full and had taken an assignation to the decrees. This is a sufficient statement here of the facts, as they are very fully given in the Law Peers' opinions.

1893. Nov. 9, 10, 16. *Sir R. Webster, Q.C.*, and *T. Shaw* (now Solicitor-General for Scotland), for the appellant:—

The action is incompetent. First, by the law of Scotland as well as that of England there can be no contribution between wrongdoers—and this principle is not confined to criminal or moral wrongdoers. Secondly, on payment of the damages and costs, the amount named in the decrees, the judgments have been satisfied. And thirdly, assignation by the original pursuers to the respondents is ineffectual to give them any right. By the assignation the respondents might be entitled to recover the whole; but they cannot sue for that because equally guilty, and when the Court finds that one tortfeasor is suing another it will not aid in enforcing the claim.

The law of Scotland seems to have been laid down in the same way as in England. Compare *Merryweather* v. *Nixan* (April 13, 1799) (2) with *Smith* v. *O'Reilly and Others* (Feb. 13, 1800) (3);

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(1) 20 Court Sess. Cas. 4th Series (Rettie), 275.

(2) 8 T. R. 186.

(3) Hume's Dec. 605.

and see the Lord Ordinary's judgment (1), *Western Bank of Scotland* v. *Douglas and Others* (2), *Western Bank of Scotland* v. *Bairds* (3), *Croskery* v. *Hendrie and Others* (4), and Stair, 1. 9. 5.; and the other English cases of *Farebrother* v. *Ansley* (5); *Wilson* v. *Milner* (6); *Adamson* v. *Jarvis* (7); *Colburn* v. *Patmore* (8); *Shackell* v. *Rosier* (9), and the American case of *Churchill* v. *Holt* (10).

The Solicitor-General for Scotland (*Asher, Q.C.*), and *Salvesen* (of the Scotch Bar) (with them *T. F. Dawson Miller*), for the respondents:—

The law of limitation as to contribution among wrongdoers does not exist in Scottish law. At the very most, the doctrine is only glanced at: Kame's Principles of Equity, edit. 1825, p. 79; Stair, 1. 9. 5.; Bell's Principles, p. 544. Baron Hume's remarks in *Smith* v. *O'Reilly and Others* (11), were obiter dicta, being outside the question there raised for decision. In the *Western Bank of Scotland* v. *Douglas and Others* (2), the point was not as to contribution between tortfeasors, but that all the parties were not called. In *Croskery* v. *Hendrie and Others* (4), Lord Shand specially reserved the question. On the other hand, the civil law recognises contribution where it is a civil wrong: Digest, 9. 3. 1; 27. 3. 13, 14. Under a joint and several decree, both are liable for the whole; but the position of the co-debtor who pays the whole is, that he has a claim for the share he has paid for the other. The result of an examination of such cases as there are is, that there is no decision against the respondents' claim except the English case of *Merryweather* v. *Nixan* (12), and that case ought not to be extended to Scotch jurisprudence.

(1) 20 Court Sess. Cas. 4th Series (Rettie), 275, at p. 277.

(2) 22 Court Sess. Cas. 2nd Series (Dunlop), 447, at p. 478.

(3) 24 Court Sess. Cas. 2nd Series (Dunlop), 859, at p. 901.

(4) 17 Court Sess. Cas. 4th Series (Rettie), 697.

(5) 1 Camp. 343.

(6) 2 Camp. 452.

(7) 4 Bing. 66, at p. 72.

(8) 1 C. M. & R. 73.

(9) 2 Bing. (N.S.) 634.

(10) 41 Amer. Rep. 191.

(11) Hume's Dec. 605.

(12) 8 T. R. 186.

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[They also cited *Ashhurst* v. *Mason* (1), and *Ramskill* v. *Edwards* (2).]

Sir R. Webster, Q.C., in reply.

Judgment after consideration.

1894. June 5. LORD HERSCHELL, L.C.:—

The question raised in this case is a somewhat novel one. On the 17th of March, 1892, in two conjoined actions, in which Mrs. Fowlis and others were pursuers, and the present appellant and respondents were the defenders, the Court of Session decerned and ordained the defenders jointly and severally to make payment of sums amounting to £600. On the 24th of May, 1892, a similar decree was made as regards the sum of £239 4*s.* 1*d.*, the pursuers' costs of the action. The pursuers, as they were entitled to do, sought payment of the entire sum of £839 4*s.* 1*d.* from the present respondents, who were by the decrees made severally as well as jointly liable. The respondents paid the entire amount, but took from the pursuers an assignation of the judgment, and of the moneys thereby secured. The respondents thereupon commenced an action to recover one-half of the amount so paid by them from the appellant. This action the appellant maintained was incompetent on the ground that there is no contribution between wrongdoers, that the judgment had been satisfied, and that the assignation of it to the respondents was ineffectual to confer on them any right to recover in this action.

The first of the two conjoined actions was instituted by Mrs. Fowlis on behalf of herself and some of her children, and by others of her children, who were majors, against the respondents, to recover damages for the loss of her husband and the father of the children, whose death was alleged to have been due to the negligence of the defenders. His death was occasioned by the fall of a part of the tackle which was being used in the discharge of a vessel belonging to the defenders. They denied the negligence imputed to them, and alleged that if there had been any negligence it was that of the appellant, a stevedore employed to discharge the ship. The pursuers thereupon brought an action against him also, and the two actions were by order conjoined. The jury found negligence on the part of both the defenders. The decree of the 17th of March, to which allusion has already been made, was the decree applying this verdict. The decree of the 24th of May related to the costs.

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(1) Law Rep. 20 Eq. 225.

(2) 31 Ch. D. 100.

My Lords, we have before us in the present action only the pleadings and verdict in the conjoined actions. It is at least consistent with these that the jury may have found their verdict of negligence against the shipping company, not on the ground of any personal default on the part of the company or its managers, but by reason of some negligence imputable to the master of the vessel. It is important to bear this in mind.

The learned counsel for the appellant did not contest the proposition that in general, where one of two co-obligants discharges the entire debt, he is entitled, unless there be some equity to the contrary, to call for an assignation of it, and to use such assignation for the purpose of enforcing payment of the share of his co-obligant. It is no answer to such an action to say that the whole of the debt has been discharged, and that there was, therefore, nothing to assign. There can be no doubt that the decrees of the 17th of March and 24th of May created joint and several debts. Why, then, should a co-debtor, who has paid the entire sum due, and received an assignation (it is unnecessary to inquire whether he could have demanded it), when he seeks to recover the share of his co-debtor, be subject more than other co-obligants to the answer that, the entire debt having been discharged, nothing remains due on the judgment, and that it can, therefore, no longer be proceeded on? The only answer, as it seems to me, must be that the joint debt resulted from a joint wrong, and that the law will not permit or assist any wrongdoer to recover contribution from another. It will be observed, however, that this is to allow the defender to set up his own wrong by way of answer, for the pursuer makes out a primâ facie case by the production of the judgment and assignation. He has no need to rely on the joint wrong, or to go behind the judgment and assignation. On principle I can see no reason why, when a joint judgment debt has resulted from a joint wrong, each co-debtor should not pay his share; or why, if one be compelled by the creditor to pay the whole debt, the other should be enabled to go free by setting up his own wrong. Suppose a settlement were arrived at before the case was tried, and the wrongdoers gave a joint and several bond in discharge of the pursuer's claim, can it be doubted that, if one of them were forced to pay the whole, he could recover from the other his share? Why should the case be different where the issue is a decree that they shall jointly and severally pay? The learned judges in the Inner House, differing from the Lord Ordinary, have decided in favour of the pursuers in the present action. I am not disposed to dissent from their conclusion unless it can be clearly shewn to be contrary to the established law of Scotland.

There is certainly no express decision on the point. The appellant relied mainly on a dictum of Baron Hume. That learned Judge said, "It is all unum negotium in regard to those who are so far engaged in the wrong as to be liable for the consequences; and there is no principle here, as in the case of cautioners binding for the same debt, on which to imply any tacit agreement among them for mutual relief or division of the loss. Nor is the law at all inclined to distribute the damages out of tenderness to the delinquents." The observation that there was no right to mutual relief was not in any way necessary to the decision. It was a mere dictum. On the other hand, Lord Bankton and Lord Kames have both indicated views favouring the right to relief by a person bound ex delicto against his co-obligant.

It is not necessary in this appeal to decide whether there can be any right to contribution in the case of a delict proper when the liability has arisen from a conscious and therefore moral wrong, nor even whether in every case of quasi-delict a delinquent may obtain relief against his co-delinquent, though I see, as at present advised, no reason to differ from the opinion, which I gather my noble and learned friend Lord Watson holds, that such a right may exist. In circumstances such as those with which your Lordships have to deal, I cannot but think that equity and justice are in favour of the conclusion arrived at by the Inner House, and there seems to be no authority compelling a contrary decision. It was urged that the person seeking relief might be the more culpable of the delinquents; but it is just as likely that he should be the less culpable. In selecting from which of his co-debtors he will obtain payment, the creditor would be guided usually by considerations wholly independent of the relative culpability of those from whom he may recover it.

Much reliance was placed by the learned counsel for the appellant upon the judgment in the English case of *Merryweather* v. *Nixan* (1). The reasons to be found in Lord Kenyon's judgment, so far as reported, are somewhat meagre, and the statement of the facts of the case is not less so. It is now too late to question that decision in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries. There has certainly been a tendency to limit its application even in England. In the case of *Adamson* v. *Jarvis* (2), Best, C.J., in delivering the judgment of the Court, referred to the case of *Philips* v. *Biggs* (3), which he said was never decided; "but the Court of Chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors." He then proceeded as follows: "From the inclination of the Court in this last case, and from the concluding part of Lord Kenyon's judgment in *Merryweather* v. *Nixan* (1), and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." If the view thus expressed by the Court of Common Pleas be correct (and I see no reason to dissent from it), the doctrine that one tortfeasor cannot recover from another is inapplicable to a case like that now under consideration.

For these reasons I move your Lordships that the interlocutor appealed from be affirmed, and the appeal dismissed with costs.

(1) 8 T. R. 186.
(2) 4 Bing. 66.
(3) Hard. 164.

LORD WATSON :—

The respondent company are owners of the steamship *Fergus*, which, in April, 1891, carried a cargo of pig-iron from Middlesborough to Grangemouth, where it was discharged by the appellant. In the course of that operation, David Fowlis, one of the workmen in his employment, was killed by the fall of a block, which formed part of the ship's tackle used in unloading.

The family of the deceased brought an action of damages against the company, in which, besides alleging that the ship's tackle was of slighter make than is usually employed in vessels built for carrying pig-iron, they attributed the fall of the block to the defects of an iron hook to which it was attached. They raised a second action of damages against the appellant, in which they repeated some of these averments, and further alleged that it was the obvious duty of the appellant either to reject the tackle or to use it with great caution; and that, in breach of such duty, he recklessly subjected the tackle to severe and unnecessary strains, by putting loads upon it which would have been sufficiently heavy for tackle made for the express purpose of unloading pig-iron.

The cases were sent to trial together, when the jury found against each of the defenders, that the fall of the block, and its fatal consequences, were due to their fault; and they assessed the total damage sustained by the pursuers at £600. There is certainly room for speculation as to the process of reasoning by which the jury arrived at that double result; but I can find nothing in their verdict, or in the record from which the issue was taken, which can be held to impute personal fault to the company or its directors, in this sense, that they knew of any flaw in the tackle of the *Fergus*, or were affected by any other knowledge which could make them conscious wrongdoers.

The Court applied the verdict, by decerning against the parties to the present appeal, jointly and severally, for the full amount of the damages fixed by the jury, and found the pursuers entitled to expenses in both actions. These were subsequently taxed at £237 19*s.* 9*d.*, for which sum also the pursuers obtained a joint and several decree. They extracted both decrees, and gave a charge to the respondent company, who paid their demands in full, and took an assignation to the decrees. The appellant having declined to relieve them of any part of the sums thus paid by them, the company brought this action, in which they ask decree against him for a moiety of these sums. The Lord Ordinary (Wellwood) dismissed the action, on the ground that the company, being joint wrongdoers with the appellant, had no claim of relief. Their Lordships of the Second Division unanimously recalled his judgment, and gave the company decree as craved.

At the Bar of the House, the appellant mainly relied on the proposition, which he endeavoured to establish by authority, that, by the law of Scotland, there can be no right of contribution among persons who are jointly responsible for the civil consequences of any delict or quasi-delict. Delicts proper embrace all breaches of the law which expose their perpetrator to criminal punishment. The term quasi-delict is generally applied to any violation of the common or statute law, which does not infer criminal consequences, and does not consist in the breach of any contract, express or implied. Cases may and do often occur in which it is exceedingly difficult to draw the line between delicts and quasi-delicts. The latter class, as it has been developed in the course of the present century, covers a great variety of acts and omissions, ranging from deliberate breaches of the law, closely bordering upon crime, to breaches comparatively venial and involving no moral delinquency.

In considering the authorities which were cited on both sides of the Bar, as bearing more or less directly upon the present case, it is necessary to distinguish between these two points: (1.) The right of the party injured to select any one or more of the co-delinquents, and to exact full reparation from him or them, without making the rest parties to the suit; and (2.) the right, if any, of the co-delinquent who pays to recover a contribution from those persons who were under the same responsibility as himself.

In the case of delicts proper, the first of these points has been established in the law of Scotland from a very early period. Before, and for a considerable time after Lord Stair wrote, the Court of Session was very familiar with claims of reparation for manslaughter, spulzie, and other grave delinquencies; whilst claims of damage in respect of breach of duty by persons in a position of trust and in respect of the negligence of servants, which in recent years have occupied so much of its time, were practically unknown. The result is that the early text-books refer almost exclusively to delicts proper. But the same rule of procedure has been extended to claims arising ex quasi delicto; and a recent instance of its application is to be found in *Croskery* v. *Hendrie and Others* (1), a case to which I shall have occasion to refer hereafter. The enforcement of the rule in all cases falling within the wide category of quasi-delict has led to consequences which, in my opinion, are inconvenient, if not absurd. Thus, if a body of private trustees commit a wilful breach of directions given by the truster to the great detriment of the trust estate, all its members must be made parties to any suit for reparation, because they are held, in that case, to be liable ex contractu; whereas, if the same body commit a comparatively venial breach of duty in violation of the general law regulating trust administration, any member may be sued for the whole loss resulting because he has been guilty of a quasi-delict.

The second point, which is of crucial importance in this case, has never been the subject of judicial decision; and the authorities which have any direct bearing upon it are somewhat conflicting.

Lord Bankton and Lord Kames both affirm, in the widest terms, that a right of relief inter se is competent to all persons concerned in and responsible for the civil consequences of the same delict—a rule which must apply a fortiori in the case of quasi-delicts. Lord Bankton, after referring to the rule that each co-delinquent is liable, and may be separately sued for the whole, goes on to say (1, 10, 4): "yet payment and reparation by one liberates the rest, and in equity he ought to have relief against them proportionably since by his money they are freed from the obligation." In his treatise upon the Principles of Equity, Lord Kames adopts the same doctrine. He discusses (edit. 1800, p. 89) the principle of mutual relief between cocautioners, and points out that the same principles are equally

(1) 17 Court Sess. Cas. 4th Series (Rettie), 697.

applicable to correi debendi, adding: "and it makes no difference whether the correi debendi be bound for a civil debt, or be bound ex delicto, for in both cases equally it is the duty of the creditor to act impartially, and in both cases equally equity requires impartiality."

Baron Hume, in commenting upon *Smith* v. *O'Reilly and Others* (1), expresses a different view. That case raised no question of relief. A band of young men acting in concert had broken a number of street lamps. They were brought before the sheriff upon a complaint by the contractor to whom the lamps belonged, with concurrence of the fiscal, and were found jointly and severally liable in a fine of £5 payable to the fiscal, and in £30 of compensation to the private prosecutor. In so far as it related to the fine the sheriff's decree was plainly erroneous, because conjunct and several liability is unknown to the criminal law. The cause was carried by the accused to the Court of Session, where a fine of £1 5*s.* each was substituted for the penalty awarded by the sheriff, and the compensation reduced to £20. No objection was taken except to the quantum of the decree for damages. In the course of his remarks, the learned Baron says: "It is all unum negotium in regard to those who are so far engaged in the wrong as to be liable for the consequences; and there is no principle here, as in the case of cautioners binding for the same debt, on which to imply any tacit agreement among them for mutual relief or division of the loss. Nor is the law at all inclined to distribute the damages out of tenderness to the delinquents. On the contrary, what the law mainly considers on such occasions is, the convenience of the injured party, that he may recover his damages as speedily and certainly, and with as little trouble and expense as may be." It is possible that the observations of the learned Baron were directed to the form of the decree which the judge ought to give to the party injured, when, as in that case, all the delinquents are sued for reparation. If he obtains a joint and several decree against them all, it can in nowise obstruct his convenience in recovering that the delinquent who pays him should have relief from the rest.

(1) Feb. 13, 1800. Hume Dec. 605.

I do not think it necessary to cite in detail the passages in Lord Stair's Institutions (1, 9. 5), which were relied on by both parties. They deal with the question, whether one co-delinquent can be sued for the whole, which his Lordship states to be not clear in equity, though settled by positive law; and such expressions as might be held to refer to the right of relief are, in my opinion, susceptible of different constructions. It is, however, material to note that Lord Stair expressly limits the operation of the rule to those persons who have either taken an active share in committing the delict, or who knowingly sanctioned its commission. Mr. Erskine (3. 1. 15), after stating the rule of procedure, says: "as soon as the damage is repaired or made up to the party hurt by any of them, the obligation is extinguished as to the rest; for an obligation founded upon damage cannot possibly continue after the damage ceaseth to exist." That is certainly true, in so far as the injured party is concerned. His claim is "founded upon damage"; the claim of relief rests, not upon any injury sustained by the claimant, but upon the fact, as Lord Bankton puts it, that by the use of his money the rest have been freed from their obligation—a circumstance which in ordinary cases is sufficient according to the law of Scotland to raise a right of relief.

Nor do I consider it necessary to refer in detail to the observations made by the late Lord President (then Lord Justice Clerk) in *Liquidators of Western Bank* v. *Douglas and Others* (1). That was an action against directors based on gross and wilful malversation and on gross habitual and total neglect of duty, in which all were participant; and, alternatively, on fraudulent concealment, or fraudulent misrepresentation, or gross negligence, in which all of them were implicated. Some of these allegations, if proved, would have amounted to delict. The defenders pleaded that the action could not proceed until an official of the bank, who appeared on the face of the record to be a co-delinquent, was called as a party. The Court rejected the plea upon the ground that the action was founded upon delict or quasi-delict. The observations of the Lord President, upon which the appellant relied, do not appear to me to carry the doctrine beyond that

(1) 22 Court Sess. Cas. 2nd Series, pp. 475, *et seq.*

limit; and it is necessary to notice in connection with them the views expressed by the learned judge at a subsequent stage of the same case, in *Liquidators of Western Bank* v. *Bairds* (1). His Lordship said: "In an ordinary action brought against trustees or managers, or mandatories acting under authority from others, where liability is sought to be enforced simply on the ground of gross neglect or omission, it may be fairly questioned whether all the parties implicated ought not to be called, so that, although liable, it may be, conjunctly and severally, they may yet inter se be entitled to relief. The effect of gross neglect may be to deprive trustees of the protection expressly conferred by the trust deed, or, as in this case, by contract, against liability for omission or for each other. But it does not follow that their liability on that ground, although each may be subjected in solidum for loss caused by the gross neglect of all, is of such a nature as to deprive the trustee who is made liable of his relief against co-trustees equally culpable with himself." These remarks appear to me to indicate that, in the opinion of the learned judge, the rule of procedure applicable to delicts had in the case of some quasi-delicts been carried beyond equitable limits, and also that the nature of a quasi-delict may be such that one co-delinquent, upon whom liability has been fixed, may have relief against the rest.

An opinion to the same effect was expressed by my noble and learned friend Lord Shand in the subsequent case of *Croskery* v. *Hendrie and Others* (2) already referred to. The action was one of damages against trustees, and was held by the Court to be founded, not upon contract, but upon quasi-delict. In repelling the plea that all the co-delinquents had not been called as defenders Lord Shand said: "If I thought that by so holding we were prejudicing the question whether, when one of the trustees has been found liable for a breach of trust duty, and there has been no fraud, he could claim a contribution from those who have not been called, but who were also parties to the acts of negligence or violation of duty which created the liability to the beneficiaries, it might have been different. But when a pursuer has reasons for selecting one defender rather than another, there can be no prejudice suffered, as amongst the trustees themselves, in the subsequent question whether those who have not been called, but who were, it may be, equally to blame, must bear a share of the loss to the estate."

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(1) 24 Court Sess. Cas. 2nd Series (Dunlop), at pp. 911, 912.

(2) 17 Court Sess. Cas. 4th Series (Rettie), 697.

From these authorities, which are to some extent conflicting and in other respects are not so definite as one could wish, I think the following conclusions may be derived. They are at variance in so far as they directly relate to the existence or non-existence of a right of relief among those persons who have incurred civil liability by acting together in the perpetration of an offence against the criminal law. But it does not appear to me that the dicta of those writers who negative the existence of such a right can be held to contemplate every case of quasi-delict, whatever be its nature. They primâ facie refer to proper delicts, and might ex paritate rationis be extended to every quasi-delict which, according to the phraseology of Scotch law, sapit naturam delicti; but they cannot, in my opinion, be fairly read as referring to quasi-delicts which involve no moral offence on the part of the delinquent. The opinions expressed by Lord President Inglis, and more recently by Lord Shand, point strongly to that interpretation. These opinions refer, no doubt, to persons who in their trust capacity have been guilty of acts or omissions injurious to the estate under their charge and amounting to quasi-delict; but it is obvious that the exception which they suggest cannot be founded on the circumstance that the co-delinquents were trustees, but must rest on the principle that a right of relief exists and is available to a co-delinquent whose acts or omissions are not tainted with fraud or other moral delinquency.

I do not find it necessary for the purposes of this appeal to determine whether and how far the doctrine of Bankton and Kames, or that laid down by Baron Hume, ought to be accepted. I have already indicated my opinion that the circumstances of this case bring the respondent company within the scope of the principle just stated, which I do not hesitate to affirm upon its own merits, whether it be regarded as an exception from the general rule or not. There is weighty and recent authority in its favour, there is no tangible authority against it, and it appears to me to be founded on substantial considerations of equity.

Owing to the novelty of the questions which it involves, I have been led to discuss this branch of the case with, it may be, unnecessary detail. But I desire also to rest my decision upon another and in some respects a broader ground, which is very shortly and forcibly stated in the judgment of Lord Rutherfurd Clark. This is not an action brought by one delinquent against whom decree has passed in order to obtain contribution from his co-delinquent who has not been sued. The respondent company do not require to allege and prove either delict or quasi-delict as the foundation of their claim, which rests upon a decree constituting a civil debt against the appellant as well as against themselves. There might be some principle in a Court of Law refusing to permit a suitor to aver and prove his own crime or moral delinquency as the medium of recovering from one whom he alleges to have been a co-delinquent. But the case is very different where the injured party's claim of damage is liquidated by a joint and several decree against all the delinquents. In that case—which is the present case—the sum decreed is simply a civil debt, and the meaning which the law attaches to a decree constituting a debt in these terms is, that each debtor under the decree is liable in solidum to the pursuer, and that inter se each is liable only pro ratâ, or, in other words, for an equal share with the rest. In this case it is the appellant who seeks to escape from the natural import of the decree, by going behind it in order to establish his own co-delinquency.

It was urged for the appellant that, seeing it is impossible to determine the exact proportion of the total damage attributable to the fault of each debtor, the whole loss must fall upon the debtor against whom the creditor chooses to enforce the decree, otherwise contributors might have to pay in excess of their real share. I cannot appreciate the force of that reasoning. The creditor is not bound to recover the whole from one; he may take it from all in what proportions he chooses; but that right of selection is not given to him in order that he may assess the damage due by each, but for his own convenience and in order that he may get in his money with the least possible trouble.

And I fail to see how any inequality in contribution, such as the appellant suggested, could be redressed by the adoption of a rule which would practically leave it to the creditor to determine whether his damages should be borne by one or more or all of the debtors, and if by all in what proportions. The result of the rule, in many cases, would be that the whole loss would fall upon the debtor who had the least share in causing the injury.

I have not hitherto noticed the English case of *Merryweather* v. *Nixan* (1). Assuming it to be an authority establishing the general rule for which the appellant contends—a proposition which seems to admit of doubt—I can only regard it as a positive rule of the common law of England, which is inconsistent with, and ought not to override, the law and practice of Scotland. The merits of the rule are not, in my opinion, such as to commend it to universal acceptation.

For these reasons I am of opinion that the interlocutor appealed from is right and ought to be affirmed with costs.

LORD HALSBURY :—

I concur with the proposition that the case of *Merryweather* v. *Nixan* (1) has been so long and so universally acknowledged as part of the English law that even if one's own judgment did not concur with its principle it would be now too late to question its applicability to all cases in England governed by the principle therein enunciated ; but I am not prepared to differ from the views entertained by the Lord Chancellor and my noble and learned friend Lord Watson when dealing with the jurisprudence of Scotland.

The difficulty which has arisen is, I think, one of words. The word "tort" in English law is not always used with strict logical precision. The same act may sometimes be treated as a breach of contract and sometimes as a tort. But "tort" in its strictest meaning, as it seems to me, ought to exclude the right of contribution which would imply a presumed contract to subscribe towards the commission of a wrong. It seems to me, therefore, that the distinction between classes of torts or quasi-delicts and delicts proper is reasonable and just, though I doubt

(1) 8 T. R. 186.

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whether in dealing with an English case one would be at liberty to adopt such a distinction. It becomes unnecessary to consider the form of the suit; but I think that in England the transmutation of the cause of action into a judgment would not prevent the application of the principle of *Merryweather* v. *Nixan* (1).

LORD SHAND :—

I also am of opinion that the appeal in this case should be dismissed, and, having had an opportunity of reading and considering the opinions which have just been delivered by the Lord Chancellor and my noble and learned friend opposite (Lord Watson), I have nothing to add to the reasons which have been given by them.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 5th June, 1894.

Agents for appellant: *Parker & Ponsford, for Macpherson & Mackay, W.S., Edinburgh.*

Agents for respondents: *Thomas Cooper & Co., for Boyd, Jameson, & Kelly, W.S., Leith.*

(1) 8 T. R. 186.

[HOUSE OF LORDS.]

H. L. (Sc.)
1894
June 7.

LESLIE . . . . APPELLANT;

AND

J. YOUNG & SONS . . . . RESPONDENTS.

Copyright—Railway Time-tables—Circular Tours—Piracy — Copyright Act (5 & 6 Vict. c. 45), s. 19.

The mere publication in any particular order of the time-tables issued by railway companies cannot be claimed as a subject-matter of copyright, if no more has been done than to copy them in their order, leaving out such stations as the author thinks fit.

But abridged information of train service in connection with circular tours of a particular locality may be the subject-matter of copyright.

The appellant, the proprietor of a monthly penny railway time-table affecting the Perth district, sought an injunction against the respondents, the publishers of a new Perth railway time-table, to restrain, inter alia, the sale of their time-tables for July, 1891, on the ground of infringement. ✓ He alleged that the respondents, instead of going to the common and public sources for materials, substantially copied his book, and thus took advantage of his skill and labour in condensing into a small space a huge mass of information. That they had also copied his circular tour information. This latter charge was practically admitted. The circular tour information occupied only four pages out of about forty of the appellant's book:—

Held, reversing the decision of the Court of Session (20 Court Sess. Cas. 4th Series (Rettie), 1077), that the appellant was entitled to an injunction against the reproduction of his compilation of circular tours, it being an abridgment of information of a most useful description, and, although it occupied such a small space, it was to be treated as an independent work, and protected by copyright law:

Held, secondly, affirming the decision of the Court of Session, that the appellant was not entitled to an injunction with respect to the railway ✓time-tables, for the books were not by any means identical; and it being only necessary for either party to copy such tables in order to provide the same information in his book as in that of the other party, substantial appropriation must be shewn before proceedings on the ground of infringement of copyright could be justified.

APPEAL from a judgment of the First Division of the Court of Session, Scotland (1), which reversed an interlocutor of the Lord Ordinary (Low) in an action for an injunction raised by Duncan Leslie, the appellant, against Messrs. J. Young & Sons, printers, Perth, the respondents, for alleged infringement of the appellant's copyright in certain railway time-tables, known as "Leslie's Time Tables and Diary."

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(1) 20 Court Sess. Cas. 4th Series (Rettie), 1077.

The appellant asked for an injunction against the respondents selling, &c., their time-tables for July, 1891; and, further, to interdict the respondents from printing, &c., any time-tables copied, or only colourably different, from the appellant's publication.

The question was, whether the respondents, instead of going to the common and public sources, substantially copied the appellant's time-tables, and thus took advantage of the appellant's skill and labour in condensing into a small space a huge mass of general information as to the train service in the neighbourhood of Perth. It was practically admitted that the appellant's circular tours were taken and reprinted in the respondents' time-table.

Both books were of the usual small pocket size, sold at a penny, and issued monthly. The appellant's book contained about one hundred pages, including many blank spaces for a diary of the month. The respondents' book was of similar size and bulk, but the first thirty-nine pages were occupied with an original A B C railway time-table: to this the appellant made no claim.

The appellant stated that his time-tables were originally compiled in 1875, and were registered at Stationers' Hall in 1877. They were arranged for the purpose of putting, in convenient form, accurate information for the use of the public in Perth and the surrounding districts, including details as to railway, coach, steamer, and postal service, suggested circular tours, &c. That the information collected was gathered and arranged in systematized form at great expense, and as the result of great labour, skill, and experience. That great accuracy had been secured by continual revision from month to month. After many years of care and skill the appellant had obtained for his time-tables a very wide circulation and a high reputation. That the respondents, who were their rivals in the printing and publishing trade, had deliberately copied their details from the appellant's publication for the previous months of March, April, and May; that many of the details borrowed from the appellant's publication were not to be found in the ordinary official railway, steamboat, or coach time-tables, or in any publication of the kind. These were obtained by the appellant from other sources, and were the result of much labour. That in the appellant's time-tables selections had been made from the official time-tables of certain trains and certain stations, and that these selections had been repeatedly embodied word for word and column by column in the respondents' time-tables. That in fact the whole routes which occur in the respondents' tables were to be found in the appellant's tables, although there were certain routes given by the appellant not appearing in the respondents' book. That the respondents had altered the order in which the tables occurred, but the tables themselves were identical. Again, mileage given, often the result of special inquiry on the part of the appellant, had been taken. That the respondents had appropriated the appellant's selection of miscellaneous information, and in particular his "Foreign and Colonial Mails." That, further, an elaborated compilation of circular tours prepared for the appellant's time-tables had been inserted word for word. The respondents denied that their publication was an infringement of the appellant's right, and alleged that their time-tables contained much more information, and were compiled upon a different principle, the first thirty-nine pages being upon what is called the A B C principle, while the remaining portion of the time-tables was compiled from advance-sheets and time-tables and advertisements issued by the railway and other companies and available to the public. And that while the appellant was seeking to suppress the respondents' publication he had actually in his issue of time-tables for August, September, October, and November, subsequent to the raising of this suit, adopted the A B C method of compilation used by the respondents. That the mileage was taken from the published tables issued by the railway companies with reference to tours. That no substantial labour or skill was required or used in the description of the circular tours, and the list was withdrawn from the time-tables after August, it being the practice to insert the same only during the few months of the touring season.

A proof was allowed, from which it appeared that the respondents produced as their manuscript what the appellant alleged to be a mere skeleton, giving only the pages and heading of the lines which the various pages were to contain. They alleged they gave these to the printers, who, from information in the skeleton notes, set up from the regular time-tables. The appellant alleged this was an impossible way of setting up a time-table; and the evidence shewed the printers made some use of the appellant's book.

1893. Jan. 31. The Lord Ordinary (Low), found—(2.) that it is proved that the tables, information, and other printed matter contained upon pages 40 to 52, both inclusive, upon page 53, with the exception of the time-table for the West Coast Route, and upon pages 55, 57, 59, 61, 63, 65, 67, 69, 93, 95, and 98 of the respondents' publication complained of, viz., J. Young & Sons' Perth A B C Time Tables, for the month of July, 1891, were copied either literally, or only with colourable differences and variations, from the said publication of the complainer, and amount to a piracy thereof: Therefore, to the extent of the second of the above findings, sustains the reasons of suspension, and interdicts, prohibits, and discharges the respondents from selling or exposing to sale, circulating, or distributing the foresaid time-tables, information, and other matter printed upon the foresaid pages of their said publication; and quoad ultra repels the reasons of suspension, and refuses the prayer of the note, and decerns: Finds the complainer entitled to expenses.

On the 20th of July, 1893, the First Division recalled the Lord Ordinary's interlocutor and refused an injunction (1).

On appeal,

June 5, 7. *The Solicitor-General for Scotland* (*Shaw*, Q.C.), and *J. Wilson* (with them, *T. Trotter*), (all of the Scotch Bar), for the appellant:—

The respondents have appropriated the product of the skill and labour of the appellant. It may be conceded that one author may arrive at the same result as another by his own labour; this

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(1) 20 Court Sess. Cas. 4th Series (Rettie), 1077.

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is not such a case. The appellant's book has been copied together with his mistakes, phraseology, foot and side notes. The skeleton manuscript notes produced did not contain information which would enable compositors to set up the tables, but are simply the general plan of the respondents' work.

[They commented on *Kelly* v. *Morris* (1); *Morris* v. *Wright* (2); *Lamb* v. *Evans* (3); *Alexander* v. *Mackenzie* (4), a book of conveyancing forms.]

W. Campbell (with him *J. Graham Stewart* (both of the Scotch Bar), was heard only on the question arising upon the circular tours and postal information:—

The particulars of the tours which have been referred to were known and common to the public, and the only valid complaint is that the respondents, to save the mechanical part of the labour, which was at the most two hours' work, set up from the appellant's tours. This is not such a use of the appellant's book as to entitle him to an interdict.

[Lord Herschell, L.C., mentioned *Bradbury* v. *Hotten* (5), where nine cartoons of Punch were taken, and it was held an infringement because taken for the same purpose.]

The materials to be worked up are almost identical, and the question is, Have not the respondents applied fresh labour to the work without making a copy of it? Besides, the respondents have a set-off, inasmuch as the appellant has printed the respondents' A B C time-table.

[Lord Herschell, L.C.:—That is no answer to this case.]

The Solicitor-General for Scotland, in reply, did not press for an injunction regarding the "Foreign and Colonial" postage information.

Lord Herschell, L.C.:—

This is an appeal from a judgment of the Inner House recalling an interdict of the Lord Ordinary, Lord Low, and

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(1) Law Rep. 1 Eq. 697.

(2) Law Rep. 5 Ch. 279.

(3) [1893] 1 Ch. 218, at p. 224.

(4) 9 Court Sess. Cas. 2nd Series (Dunlop), 748.

(5) Law Rep. 8 Ex. 1; Copinger, 212.

Lord Herschell, L.C.

assoilzing the defenders. The action was brought in respect of an alleged infringement by the defenders of the copyright claimed by the pursuer in certain time-tables which were published by him at Perth. The work alleged to have been pirated contains time-tables, and certain other information to which I will more particularly allude presently. The piracy complained of consisted of an alleged improper use of certain time-tables, published by the pursuer relating to railway trains, and also relating to ferries and steamers and coaches. The Lord Ordinary came to the conclusion that the defenders had pirated a part of the pursuer's work in which he had a copyright, in the matter contained in pages 40 to 53 of the defenders' work, with the exception of a particular time-table, and also in certain other pages which he specified, and in respect of these he granted an interdict. My Lords, the Inner House, as I have said, recalled that interlocutor, coming to the conclusion that there had been no piracy at all.

The time-tables, which are to be found on the earlier pages which I have mentioned, namely, 40 to 52 and part of 53, consist of tables in the usual form found in all railway time-tables, taking Perth in the main as the starting-point, this being a periodical published at Perth for the information of persons coming to or going from (more particularly going from) that place. The information in these time-tables was of course derived by the pursuer from sources which were as open to the defenders as to himself, and he does not and cannot claim any right to the information as such; he can only claim copyright in them, if they are the result in some respect or other of independent work on his part, and if advantage has been substantially taken by the defenders of that independent labour. The mere publication in any particular order of the time-tables which are to be found in railway guides and the publications of the different railway companies could not be claimed as a subject-matter of copyright. Proceedings could not be taken against a person who merely published that information which it was open to all the world to publish and to obtain from the same source.

As regards some of these tables, there is really nothing more to be said against what the defenders have done, than that they have published the same table between the same stations in the same order as the pursuer; but then those tables, with all those stations and all those times of the trains, are to be found in the companies' books, and neither party would have anything more to do than to copy them in order to arrive at the information which is to be found in both books. It is true that in some cases the mileage has been taken, and is admitted by the defenders to have been taken from the pursuer's book. As regards other of these tables, it is said that they were not mere copies of tables to be found in the railway guides, but that there was a certain selection of stations, the smaller stations being omitted, and a selection of trains, some of the trains also being omitted. That applies no doubt to some of the tables. But, my Lords, looking at these tables as a whole, and having regard to the fact that it is admitted that the defenders' work is, as regards these tables, not by any means in all respects a copy of the pursuer's work, that it is not denied that there was a certain amount of original work done by them in compiling these tables, and that there are the differences which have been pointed out, I do not think it can be said that as regards these tables there has been an appropriation by the defenders of the pursuer's work such as to entitle the pursuer to complain, and to obtain the interdict which he claims. The real truth is, that although it is not to be disputed that there may be copyright in a compilation or abstract involving independent labour, yet when you come to such a subject-matter as that with which we are dealing, it ought to be clearly established that, looking at these tables as a whole, there has been a substantial appropriation by the one party of the independent labour of the other, before any proceeding on the ground of copyright can be justified. I do not, therefore, see my way to differ from the conclusion at which the Inner House has arrived on this part of the case—that the interdict of the Lord Ordinary ought not to stand.

But there is another part of the case which strikes me as of a very different character. It is not separately dealt with by the Inner House, although it was specifically mentioned by the Lord Ordinary. It appears to me the only part of the work which can be said to indicate any considerable amount of independent labour, and be entitled to be regarded as an original work. I refer to the part on pages 63, 65, 67 and 69 containing the information with regard to excursions. It seems to me that this was a compilation containing an abridgment of information of a very useful character, and such as was likely to be taken advantage of by those who were travelling in the neighbourhood of Perth. Now, those pages have been, the first with some slight variation, and the others absolutely literally, copied by the defenders from the pursuer's book. My Lords, it is said that they form only a small portion of the whole book—four pages, it was said, out of forty—and that the first part consisted of an A B C time-table which was wanting in the work of the appellant. But I do not think that is a just way of regarding the matter in point of law, because a compilation of this kind may contain several independent features of different merit, of differing advantage to the public, and likely to operate to a different extent in promoting the sale of the work. It may be that one part of a work of this kind, though containing only a few pages, may be the very thing that the presence or absence of which would most largely promote or retard the sale of the work. Therefore, although these pages are but few, it seems to me that nevertheless they may be properly treated as an independent work and protected by the copyright law. If that be the proper conclusion, it seems to me impossible for your Lordships to resist the further conclusion that there has been in this case a piracy, a substantial appropriation of the pursuer's work by the defenders, and that there is therefore a right to an interdict on the part of the pursuer.

For these reasons I think that the interlocutor appealed from ought to be recalled, and that in place thereof the interlocutor of the Lord Ordinary ought to be varied by restricting and confining the interdict to the matter printed upon pages 63, 65, 67 and 69, and that the interdict should be against printing, publishing, selling or exposing for sale, circulating or distributing the time-tables or any other work containing the matter printed on pages 63, 65, 67 and 69 of the defenders' Perth time-tables.

There remains the question how the costs ought to be dealt with. The appellant was in the right in coming to this House, because the respondents had obtained an interlocutor which your Lordships think cannot be supported; and therefore I see no reason why the ordinary rule should not be followed, in accordance with which the respondents would pay the costs of this appeal. But then we come to the question of the costs below. There the present respondents were partly in the right in their appeal from the interlocutor of the Lord Ordinary. On the other hand, the appellant was partly in the wrong in putting forward too large a case, and it was that very large case which involved great expense in the proof. A great part of the proof was occupied with the question as to these time-tables, some of which, as I have said, really were not an abridgment at all, but were matters regarding which, as it seems to me, it was impossible that the pursuer could reasonably complain of an invasion of copyright. It is therefore clear that a large part of the expense of taking the proof before the Lord Ordinary has resulted from the pursuer insisting upon a contention which I believe all your Lordships think, and which the Inner House also thought, it impossible to support. I believe all your Lordships think that justice will best be attained by ordering the respondents to pay the costs of this appeal, and ordering that the pursuer shall have one-third of his taxed costs of the proceedings at the trial, and in the Inner House.

LORD WATSON:—

I am of the same opinion. Upon the argument which was addressed to us for the appellant (with, I ought to say, the exception of a few sentences which related to those pages of his book which refer to tourist arrangements and to Saturday excursions), I have had no difficulty in coming to the conclusion that the reasoning of the learned judges of the First Division of the Court of Session was right, and that, for the reasons assigned in their judgments, there is no ground for granting any interdict against the respondents. But those two points, to which I have already alluded, were overlooked, as it seems to me, by the learned judges, because they were not pressed upon the attention of the Court. Upon that part of the case I have as little difficulty in holding that an interdict ought to issue. I am not

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prepared to say that every line or even every page of a compilation such as this carries with it a right to protection as copyright; I should be very sorry to affirm that to be universally true; but it appears to me that, in copying these tourist and excursion tables, the respondents have taken the bulk of that portion of the work which carries such a right. If there are any parts of this work which really involve such merit as to entitle them to the protection of copyright, I think these are chiefly to be found in the pages which have been appropriated by the respondents without a single alteration.

I think it would be impossible in these circumstances for the respondents to dispute that they have pirated the work to that extent, except by shewing that such part of the work had no protection. I do not think there can be any doubt that a work of this kind, shewing that a considerable amount of original trouble was taken in bringing all the information together in the form of an abstract for the use of a particular locality, is entitled to protection.

Lord Ashbourne :—

I concur. The portions of this book referred to by my noble and learned friend upon the Woolsack, and my noble and learned friend who has just spoken, are, I think, clearly entitled to protection. They are a substantial part of the book: they contain a great deal of very useful information—the result of careful work and accurate compilation—and I can myself well believe that a great many purchasers would be influenced in making their purchases by the existence of those pages and of those pages alone, not needing the other information which was very accessible and easily obtainable.

Although for the purposes of the order of the House attention is confined to those particular pages, I am myself of opinion from what I have heard in the able arguments which have been addressed to the House, and from my own examination of the books, that the respondents have very largely availed themselves of the labour and general ability shewn by the appellant here, and although attention is necessarily confined in the order of your Lordships' House to the particular pages referred to by my noble and learned friend on the Woolsack, still one cannot, in measuring and in considering the question of costs, forget the bearing and the general merits of the rest of the book. I have no doubt, my Lords, that the order proposed to be made is one which is fully in accordance with the justice of the case, and I entirely concur in the portion of the order with reference to costs.

LORD SHAND:—

I concur also in the opinions which have been delivered, and in thinking that your Lordships should grant to the appellant relief to the extent to which it is now proposed to be given.

So far as the time-tables are concerned, which really embrace a considerable proportion of the book in point of length, it is to be observed that the information there given is derived from common sources accessible to every one. There is no information there given which is not to be found in the ordinary railway time-tables which are issued by each of the railway companies —particularly the Caledonian and North British companies, whose railways are the subject on which information is given in these books. The only particulars in which I think it is said that some advantage is gained by the use of those time-tables is that there is a convenient arrangement for people starting from Perth, and a selection of the more prominent stations instead of giving the whole list of stations as they appear in the time-tables issued by the railway companies. It does not appear to me that there has been either such labour or such ingenuity shewn with reference to either of those matters as properly to make them the subject-matter of a copyright. Therefore I am of opinion with your Lordships that, so far as the mere time-tables are concerned, there should be no interdict granted.

As regards the other matter, the list of tours which has been selected, which is also no doubt taken from the tables of the railway companies, there has not only been a selection, but also a condensation and an arrangement which would be of very considerable value to the travelling public. It is clear that those have been simply copied, word for word, in the publication which is complained of; and I cannot doubt that that forms a material part of the pursuer's book, and that he is entitled to the remedy which he asks for it. I am of opinion, therefore, that the interdict which has now been proposed should be granted. And I concur in the view that has been taken with regard to the expenses which ought to be paid to the pursuer.

Ordered, That the said Interlocutors of the 20th of July and the 17th of November, 1893, be Reversed, except in so far as the said Interlocutor of the 20th of July, 1893, recalls the Interlocutor of the Lord Ordinary (Lord Low) of the 31st of January, 1893: It is declared that the interdict should be limited to interdicting, prohibiting, and discharging the respondents from selling or exposing to sale, circulating, or distributing time-tables or any other work containing the matter printed on pages 63, 65, 67, and 69 of the publication complained of, and that the appellant (complainer) should have one-third of the costs in the Courts below: Cause remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this Judgment and this Declaration: Further Ordered, that the said respondents do pay to the appellant the costs incurred in respect of the appeal to this House.

Lords' Journals, June 7, 1894.

Agents for appellant: *Keeping & Gloag, for Clark & Macdonald, S.S.C., Edinburgh,*

Agents for respondents: *C. P. Pritchard & Maffey, for Alexander Morison, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

INSTITUTE OF PATENT AGENTS AND OTHERS . . . . APPELLANTS;

AND

JOSEPH LOCKWOOD . . . . RESPONDENT.

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Statute—Tax—Ultrà Vires—Board of Trade—Jurisdiction—Title to Sue—Patents, Designs, and Trade Marks Act, 1883 (46 *&* 47 *Vict. c.* 57), *s.* 101, *and* 1888 (51 *&* 52 *Vict. c.* 50), *s.* 1—*Register of Patent Agents Rules,* 1889.

By the Patents, Designs, and Trade Marks Act, 1883, s. 101: "The Board of Trade may from time to time make such general rules" . . . "as they think expedient, subject to the provisions of this Act. (*a*) For regulating the practice of registration under this Act." By sub-sect. 3: "General rules may be made under this section" . . . "and shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed." By sub-sect. 4: "Any rules made in pursuance of this section shall be laid before both Houses of Parliament." By sub-sect. 5: "If either House of Parliament, within the next forty days after any rules have been so laid before such house, resolve that such rules or any of them ought to be annulled, the same shall, after the date of such resolution, be of no effect."

By the Patents, Designs, and Trade Marks Act, 1888, s. 1, sub-s. 1, "after the 1st of July, 1889, a person shall not be entitled to describe himself as a patent agent . . . . unless he is registered as a patent agent in pursuance of this Act." And by sub-sect. 2, "The Board of Trade shall . . . . make such general rules as are in the opinion of the Board required for giving effect to this section, and the provisions of sect. 101 of the principal Act" (the Act of 1883) "shall apply to all rules so made as if they were made in pursuance of that section." By sub-sect. 3, Every person who proves to the satisfaction of the Board of Trade that, prior to the Act, he had bonâ fide practised as a patent agent should be entitled to be registered in pursuance of the Act. By sub-sect. 4, "If any person knowingly describes himself as a patent agent in contravention of this section, he shall be liable on summary conviction to a fine not exceeding £20."

The Board of Trade made certain rules known as the Register of Patent Agents Rules, 1889, which were laid before Parliament, and no objection was taken to them within the forty days specified by the principal Act. They provided (inter alia) for the mode by which a patent agent practising before the Act of 1888 should be entered in the register; and also for the payment of an entrance fee, and an annual fee by all patent agents

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continuing on the register, and for erasure from the register of the name of any person whose annual fee was not paid :—

Held, reversing in part the decision of the Court of Session (20 Court Sess. Cas. 4th Series (Rettie), 315), that the rules having been laid before both Houses of Parliament for forty days without being annulled were "of the same effect as if they were contained in the" statute, and as long as they remained in force it was not competent to question their authority. And, secondly, that the right mode of procedure against an unregistered patent agent was by way of summary proceeding for the penalty.

Lord Morris, while agreeing that these rules were intrà vires, dissented from the view that it was not competent for the Courts to question the validity of the rules.

APPEAL from a judgment of the Second Division of the Court of Session, Scotland (1), which assoilzied the defender from the conclusions of the action.

The Chartered Institute of Patent Agents, the appellants, were incorporated by Royal Charter in 1891, and with others raised this action against the respondent, Joseph Lockwood, engraver and artist in Glasgow, for declarator that the respondent was not registered as a patent agent in pursuance of the Patents, Designs, and Trade Marks Act, 1888, and that the respondent was not entitled to describe himself as a patent agent, whether by advertisement, by description on his place of business, by any document issued by him or otherwise, so long as he was not registered as a patent agent. And, secondly, that the respondent should be interdicted from describing himself as a patent agent, &c. The respondent claimed the right to describe himself as a patent agent, and refused to pay an annual fee in the following circumstances.

By the Patents, Designs, and Trade Marks Act of 1888 (51 & 52 Vict. c. 50), s. 1, sub-s. 1, it was provided that after the 1st of July, 1889, a person should not be entitled to describe himself as a patent agent unless registered as a patent agent in pursuance of the Act. Sub-sect. 2 of the same section provided that the Board of Trade should, as soon as might be after the passing of the Act, and from time to time, make such general rules as in the opinion of the board were required for giving effect to the said section, and it was declared that the provisions of sect. 101 of the Act of 1883 should apply "to all rules so made as if they were made in pursuance of that section." By sub-sect. 3 of the same section it was provided "that every person who proves, to the satisfaction of the Board of Trade, that prior to the passing of this Act he had been bonâ fide practising as a patent agent, shall be entitled to be registered as a patent agent in pursuance of this Act." And sub-sect. 4: "If any person knowingly describes himself as a patent agent in contravention of this section, he shall be liable, on summary conviction, to a fine not exceeding £20."

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(1) 20 Court Sess. Cas. 4th Series (Rettie), 315.

Sect. 101 of the Act of 1883 provided that the Board of Trade might from time to time make such general rules as they thought expedient subject to the provisions of the Act for regulating the practice of registration under the Act. Sub-sect. 3 enacted that the rules made in pursuance of that section should ("subject as hereinafter mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed." Sub-sect. 4 provided that any rules made should be laid before both Houses of Parliament and should be advertised. And sub-sect. 5 provided that "if either House of Parliament, within the next forty days after any rules have been so laid before such House, resolve that such rules or any of them ought to be annulled, the same shall after the date of such resolution be of no effect." The Board of Trade made certain rules dated the 11th of June, 1889, which were known as "The Register of Patent Agents Rules, 1889." The following were the material parts of the rules:—

Rule 1 provides that a register of patent agents shall be kept by the Institute of Patent Agents.

(2.) The register shall contain in one list all patent agents who are registered under the Act and these rules.

(3.) The institute shall cause a correct copy of the register to be once every year printed and placed on sale.

(4.) The institute shall appoint a registrar who shall keep the register.

(5.) "A person who is desirous of being registered in pursuance of the Act, on the ground that prior to the passing of the Act he had been bonâ fide practising as a patent agent, shall produce to the Board of Trade a statutory declaration," and on the Board of Trade being satisfied they are to transmit to the registrar a certificate that the person therein named is entitled to be registered in pursuance of the Act, and the registrar on receipt of such certificate shall cause the name of such person to be registered.

(6.) Subject to the provisions of rule 5, no person is entitled to be registered unless he has passed an examination as to his knowledge of patent law and practice, and of the duties of a patent agent.

(7.) Certain persons may be relieved from all examinations except the final.

(12.) The registrar may erase from the register the name of any person who has ceased to practise.

(13.) "If any registered person shall not, within one month from the day on which his annual registration fee becomes payable, pay such fee, the registrar may send to such registered person to his registered address a notice requiring him, on or before a day to be named in the notice, to pay his annual registration fee; and if such registered patent agent shall not within one month from the day named in such notice pay the registration fee so due from him, the registrar may erase his name from the register: Provided that the name of a person erased from the register under this rule may be restored to the register by direction of the institute or the Board of Trade on payment by such person of the fee or fees due from him, together with such further sum of money, not exceeding in amount the annual registration fee, as the institute or the Board of Trade (as the case may be) may in each particular case direct."

(16.) "If any registered person shall be convicted of an offence which, if committed in England, would be a felony or misdemeanour, or to the satisfaction of the Board of Trade guilty of disgraceful professional conduct, or, having been entitled to practise as a solicitor or law agent, shall have ceased to be so entitled, the Board of Trade may order his name to be erased from the register."

(17.) "The Board of Trade may restore to the register any name erased therefrom."

(26.) "The fees set forth in Appendix C to these rules shall be paid in respect of the several matters, and at the times and in the manner therein mentioned. The Board of Trade may from time to time, by orders signed by the secretary of the Board of Trade, alter any of, or add to, the fees payable under these rules."

By Appendix C. For the registration of patent agents in practice prior to the Act the fee was £5 5*s.*, and the annual fee to be paid by every registered patent agent, £3 3*s.*

These rules were laid before parliament and not annulled.

The respondent proved that he had practised as a patent agent prior to the Act of 1888, and he having paid £5 5*s.* his name was duly entered in the Register of Patent Agents of the 22nd of October, 1890. He, however, refused to pay the annual fee under the rules for the year commencing the 1st of January, 1891, relying on his right to practise and describe himself as a patent agent by sub-sect. 3 of sect. 1 of the Act of 1888.

On the 23rd of February, 1891, the registrar erased the respondent's name from the Register of Patent Agents. Notwithstanding the erasure, the respondent continued to practise. In May, 1891, the Institute of Patent Agents, referred to in the rules of 1889, was dissolved, and in its place the Chartered Institute of Patent Agents, the appellants, was constituted on the 11th of August, 1891. The objects of the appellant institute were (inter alia) to promote the education and training of patent agents, and to maintain a high standard of rectitude and professional conduct. By the 23rd ordinance of the appellants' charter, it was provided that the registration, annual, and examination fees, which might be received by them, might be applied, amongst other things, to improving the library, obtaining a hall, and in paying the salaries of the registrar, secretary, and officers of the institute, and in otherwise promoting the objects of the institute.

On the 19th of November, 1891, the Board of Trade published further rules, whereby all the duties and powers of the Institute of Patent Agents under the "Register of Patent Agents Rules, 1889," were transferred to and vested in the appellants.

On the 27th of April, 1892, the appellants and others raised this action.

The Lord Ordinary (Low), on the 4th of August, 1892, held that the rules were valid, and granted interdict in the terms prayed.

On the 26th of January, 1893, the Second Division of the Court of Session recalled the Lord Ordinary's interlocutor and assoilzied the respondent from the conclusions of the action, being of opinion that the rule imposing the annual fee was inept, in respect that it was ultrà vires of the Board of Trade.

On appeal,

June 11. *Byrne*, Q.C., and *A. Graham Murray*, Q.C. (of the Scotch Bar), for the appellants:—

These rules have the effect of a statutory enactment. The question in the present case was raised in *Ex parte Foreman* (1) *Dale's Case* (2), and *Bailey* v. *Williamson* (3), but not decided.

[LORD HERSCHELL, L.C.:—We cannot question the reasonableness of the rules. It is for the Legislature to do that. The substantial question here is—When the Act gives a summary remedy, can you go to the Court of Session for an interdict ?]

The appellants, having regard to the fact that their rights have been denied, are entitled to ask the Court of Session for a declaration: see *Earl of Fife* v. *Gordon* (4), and *Mitchell* v. *Gregg* (5).

[LORD HERSCHELL, L.C., mentioned *Atkinson* v. *Newcastle and Gateshead Waterworks Company* (6).]

This is a serious question for the appellants, as they have now a judgment of the Court of Session against the validity of the rules; and if the society should attempt to enforce the penalty before the sheriff, he would be bound to follow the judgment appealed from.

McCall, Q.C., and *C. H. Lindon* (with them *Crossfield*), for the

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(1) 18 Q. B. D. at pp. 399, 400.

(2) 6 Q. B. D. at p. 455.

(3) Law Rep. 8 Q. B. at p. 124.

(4) Mor. Dict. Salmon Fishing, App. No. 2.

(5) 19 Fac. Coll. 46.

(6) 2 Ex. D. 441.

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respondent, were not heard on the competency of the action, but only on the point whether the rules were valid :—

The rules are ultrà vires, for the Board of Trade have no express statutory power to impose taxation. If the Legislature had intended to give the board the power of imposing fees, such power would have been expressly given. The validity of the rules may be inquired into: *Ex parte Foreman* (1). The mere fact that the rules remained on the table of the Houses of Parliament for forty days without question is not equivalent to parliamentary sanction. The rules are in conflict with the Act of 1888, for they direct that upon payment of a specified fee by the patent agent he may be registered; whereas the Act provides, that if he has practised as a patent agent before the Act he is to be registered as a matter of course. And by sect. 27 nothing in the Act is to affect the validity of any right acquired before the Act. The fees are impositions upon patent agents already practising, and must be paid by them as the condition of their right to follow their profession. This is equivalent to taxation.

LORD HERSCHELL, L.C. :—

In this case the summons of the present appellants claims a declaration that the defender was not registered as a patent agent in pursuance of the Patents, Designs, and Trade Marks Act, 1888, and was not entitled to describe himself as a patent agent; and, in the second place, that the defender ought and should be interdicted, prohibited, and discharged from describing himself as a patent agent. The pursuers in the action were the Institute of Patent Agents and three registered patent agents practising in Glasgow. An interdict in the terms concluded for by the summons was granted by Lord Low, the Lord Ordinary, who came to the conclusion that the defender had held himself out as a patent agent when not registered, and that he was therefore liable to be interdicted in the manner prayed.

When the case came before the Second Division of the Inner House they recalled the interdict. They came to the conclusion that although the defender was not registered as a patent agent, and had been holding himself out as such without being registered, his name had been improperly removed from the register by the Institute of Patent Agents or the registrar appointed; and, consequently, that although not registered, he could not be treated as having committed an offence by so holding himself out. The majority of the learned judges came to the conclusion that the rule under which the registrar had purported to erase his name was invalid, being ultrà vires although duly made by the Board of Trade with the formalities and in the manner prescribed by the Act. They came to this conclusion on somewhat different grounds, to which I shall have to call attention in a moment. I will first state to your Lordships what are the statutory provisions, and what are the rules made under them.

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(1) 18 Q. B. D. at pp. 399, 400.

Provisions relating to the registration of Patent Agents were first made in the year 1888 by the 1st section of the Patents, Designs, and Trade Marks Act of that year, which provided that after the 1st of July, 1889, a person should not be entitled to describe himself as a patent agent unless registered as such in pursuance of the Act; and, next, that the Board of Trade should as soon as might be after the passing of the Act, and might from time to time, make such rules as were in the opinion of the Board of Trade required for giving effect to the section. It contains a further provision, which I shall have occasion to call attention to hereafter. It also provides that, "If any person knowingly describes himself as a patent agent in contravention of this section, he shall be liable on summary conviction to a fine not exceeding twenty pounds."

It will be observed that the enactment does not provide for the manner in which the register is to be formed, who is to be the registrar, the formalities requisite for registration, or any particulars in relation to it, but leaves it to the Board of Trade to make such general rules as in their opinion are required for giving effect to the section; the effect, of course, intended by the Legislature being the establishing a complete system of registration for patent agents. The Board of Trade accordingly made a number of rules, and amongst them a rule requiring a certain fee to be paid on first registration, and an annual fee of three guineas so long as the person continued on the register,

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and providing further that non-payment of the prescribed fees should be a ground for erasing the name from the register.

My Lords, the Lord Ordinary considered that those rules were intrà vires. The majority of the Inner House appear to have thought that no rules with reference to fees could be intrà vires, inasmuch as the power to impose fees was not expressly conferred. Lord Rutherfurd Clark, I gather, dissented from that view, and concurred with the Lord Ordinary in thinking that some fees might be properly imposed by rules. He said: "It is quite possible that fees may be exacted for the maintenance of the register, but the fees which are fixed by the rules are plainly in excess of what is required for that purpose, and it is equally plain that they were not imposed in order to carry that purpose into effect." I am unable to see upon the record any foundation for that conclusion. It seems to be suggested that there was an admission that they were larger than would be required for such a purpose; but no such admission has been made at the bar, nor does it appear on the record, and I cannot but think that there was some misapprehension as to there being an admission going to that extent.

I confess that it seems to me, if there were any power to impose fees at all, very difficult indeed to arrive at the conclusion, when the Board of Trade have sanctioned a particular fee, that it is within the province of a Court of Law to canvass their conclusion, and to determine what is the legitimate amount at which the fee may be fixed. Such a department as the Board of Trade is very much more competent to determine a question of that description than judges can possibly be, and it would be, I think, not an improvement upon any scheme of legislation which gave power to fix fees if those fees were made subject to the control of the judges according to their views of what fees were reasonable or unreasonable.

The question whether there is power to impose a fee at all is, no doubt, a much more serious question. The contention on the part of the respondent is, that there being no express power given to impose fees, it can never be supposed that it was intended to commit to a public body without express sanction and authority the power to impose taxation, which this in effect is. I cannot myself regard this as properly called taxation. The statute of 1883, of which this Act in many particulars is an amendment, creates a register, or, at all events, continues a register, and it provides that the Board of Trade, with the sanction of the Treasury, may regulate the fees to be required for registering and doing other acts in connection therewith; and of course the fixing of fees for a great variety of matters being left to a rule-making body is a description of legislation thoroughly well understood. It is every-day practice for those to whom rule-making is committed to have committed to them also the fixing of the fees which are to be paid in relation to matters to be done under the rules. There is, therefore, nothing novel in legislation of this description. But it is said that no such right is expressly conferred. My Lords, it is impossible to my mind to conceive wider language than that which is used in the 2nd sub-section of the 1st section of the Act of 1888. The truth is, the legislation is a skeleton piece of legislation left to be filled up in all its substantial and material particulars by the action of rules to be made by the Board of Trade. The section itself contains no provision with reference to the register or the registrar or proceedings on registration, or any of those matters; but it gives very wide power to the Board of Trade to make such rules as are in their opinion required for giving effect to the section. It seems to me that thereupon it was their duty to make all the rules necessary for making the legislation contemplated by the section effective. The Legislature must be taken to have contemplated that a register could not be made without some one filling the office of registrar, or some corresponding office; that any person performing those duties would require a payment for performing them; that the funds not having been expressly found by Parliament, must be somehow or other provided; and seeing that the system and scheme of the legislation under the previous Act had been that fees on registration should, at all events, go towards the expenses of paying for registration, I cannot but think that it was well within the scope of this enactment that the Legislature should entrust the Board of Trade, who were to make these rules, with the power of fixing such fees as they thought reasonable and necessary for carrying into effect the purposes of the section. Unless they had done so, it seems to me very difficult to say that it would have been possible to carry them into effect at all. With all deference to the learned judges who have taken a different view, it appears to me that the conclusion at which they have arrived has been induced by not sufficiently regarding the method of legislation which has been followed in the section now under consideration, and not observing that it was the intention of the Legislature, having expressed the general object, and having provided the necessary penalty, to leave the subordinate legislation, so to speak, to be carried out by the Board of Trade.

My Lords, what I am about to say bears also upon the further question which has been argued. It is said that this would be a very large power for the Legislature to commit to any other body; but it must be remembered that it is committed to a public department, and a public department largely under the control of Parliament itself; and not only so, but inasmuch as the section provides that these rules are to be dealt with in the same manner, and subject to the provisions contained in the 101st section of the previous Act, the result is to leave the matter completely in the control of Parliament, because any of the rules made by the Board of Trade may be annulled by either House of Parliament within forty days after they are laid on the table, and the laying of them on the table is made compulsory. Therefore, my Lords, I can see nothing extraordinary in leaving to such a body as the Board of Trade the powers which are in question in this case, at all events when the exercise of their functions by a great public Department of State, itself under the control of Parliament, is placed directly under the control of Parliament also and made subject to its direct action.

That really would be sufficient to determine that these rules were such as the Board of Trade were entitled to make. I will say one word, however, before leaving this part of the subject, upon the point suggested that they involved something harsh or unfair as regards the respondent, inasmuch as it was said that before this he could exercise his profession or calling of a patent agent without any registration, without the payment of any fee, and now he can only do so and represent himself as a patent agent by paying an annual fee to keep on the register. That is, in a sense, perfectly true; but, on the other hand, it must be remembered that the position of a patent agent on the register, when nobody not on the register can call himself a patent agent, is a position very different, and, in many respects, much more advantageous, than that which he occupied before; and I am not prepared to say that there is any hardship in imposing a small and reasonable fee upon a man who obtains that advantage in order that the register, in the interests of the public, may be carefully and properly maintained.

Then it is said that a right expressly given him by the statute is interfered with, inasmuch as the statute provides that "Every person who proves to the satisfaction of the Board of Trade that prior to the passing of the Act he had been bonâ fide practising as a patent agent shall be entitled to be registered as a patent agent in pursuance of this Act." Well, my Lords, a complaint is not now made that he was not so registered. It is sought to read this statute as if it ran thus: "Shall be entitled to be registered, and ever thereafter maintained on the register," which does not appear to me to fall within the language of the Act. But further than that, the argument loses sight of this, that he is only entitled to be registered in pursuance of this Act. Now, where is there anything in this Act about his title to be registered at all, or how he is to get on the register, or who is to put him there, or what register it is to be, and kept by whom? Nothing of the sort is to be found in the section. The words "in pursuance of this Act" only become intelligible if you read into the section, as the statute provides you shall, the rules which are made under sub-sect. 2. But if you read into the section, as shewing how he is to be registered in pursuance of the Act, the rules made under sub-sect. 2, then of course every rule which is intrà vires, at all events (putting aside for the moment the other question), is to be read into the section, and have just the same effect as if it had been contained in the Act itself; and if so it is impossible to say that he can claim to be registered otherwise than in the manner which the statute, as filled up, if I may say so, by the rules provides.

So far I have dealt with the question whether the rules are intrà vires; but there is no doubt another very important question which has been argued before your Lordships, namely, whether this question can be canvassed in the courts, when once the rules have been made by the Board of Trade and laid as provided on the tables of both Houses of Parliament. It is said that it is only rules properly made under sub-sect. 2 which can become part of the Act and be treated as such.

My Lords, the words of sub-sect. 2 are, "The Board of Trade shall as soon as may be after the passing of this Act, and may from time to time make such general rules as are in the opinion of the board required for giving effect to this section, and the provisions of sect. 101 of the principal Act shall apply to all rules so made as if they were made in pursuance of that section." Therefore, any rule which in the opinion of the Board of Trade is required to be made in order to give effect to the section, is a rule made pursuant to the provisions of sub-sect. 2, and any rule made pursuant to the provisions of sub-sect. 2 is to be dealt with as if made in pursuance of sect. 101 of the principal Act. Now, let us see what is to be the effect as regards rules made in pursuance of sect. 101 of the Act of 1883. First of all, "the Board of Trade may from time to time make such general rules and do such things as they think expedient," and their "general rules may be made under this section at any time after the passing of this Act, but not so as to take effect before the commencement of this Act, and shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed." The "subject as hereinafter mentioned" is this, that they are to be laid before Parliament and remain before Parliament for consideration for forty days, and during those forty days they may be annulled by a resolution of either House. If not so annulled or until so annulled what is the effect? They are to be "of the same effect as if they were contained in this Act." My Lords, I have asked in vain for any explanation of the meaning of those words or any suggestion as to the effect to be given to them if, notwithstanding that provision, the rules are open to review and consideration by the Courts. The effect of an enactment is that it binds all subjects who are affected by it. They are bound to

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conform themselves to the provisions of the law so made. The effect of a statutory rule if validly made is precisely the same that every person must conform himself to its provisions, and, if in each case a penalty be imposed, any person who does not comply with the provisions whether of the enactment or the rule becomes equally subject to the penalty. But there is this difference between a rule and an enactment, that whereas apart from some such provision as we are considering, you may canvass a rule and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament. Therefore, there is that difference between the rule and the statute. There is no difference if the rule is one within the statutory authority, but that very substantial difference, if it is open to consideration whether it be so or not.

I own I feel very great difficulty in giving to this provision, that they "shall be of the same effect as if they were contained in this Act," any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act. No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment and with regard to rules which are to be treated as if within the enactment. In that case probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it. Those are points which I need not dwell upon on the present occasion.

Although it is not necessary for the determination of this case to express an opinion upon it, yet, as the matter has been so much discussed, I think it only right to express the opinion which I entertain, that the words to which I have referred are really meaningless unless they have the effect which I have described, and they seem to me to be the apt and appropriate words for bringing about the effect which I have described.

They are words, I believe, to be found in legislation only in comparatively recent years, and it is difficult to understand why they have been inserted unless with the object I have indicated.

I have dealt at length with the question whether this rule is ultrà vires or not and whether it can be so treated, because it is the ground upon which the decision proceeded in the Court below, and inasmuch as an adverse view was expressed to the validity of the rule, it appears to me well that, differing as I do from that view, I should express my differing opinion.

But that does not really conclude this case. The further question remains which was dealt with in some subsequent observations of one of the learned judges, Lord Young, whether even assuming that the rule is bad, assuming that the name of the defender was properly erased, assuming that he had no right to practise as a patent agent, assuming that by doing so he rendered himself liable to the penalty prescribed, it is open to the Institute of Patent Agents and three practising patent agents to come to the Court of Session and ask for the conclusions to be found in the summons of the pursuer. My Lords, upon that I confess, with all deference to the Lord Ordinary, I cannot but entertain a very strong opinion. You have here, for the first time, a new offence created—the offence of practising as a patent agent without being on the register. But for the enactment creating that offence, the defender has done nothing of which anybody would have a legal right to complain either civilly or criminally. The Legislature, having created that new offence, has prescribed the punishment for it, namely, a penalty of £20. Can it possibly under these circumstances be open to bring the individual, not before the summary Court at small expense to determine the question of his liability to a £20 penalty, but to bring him before the Court of Session with its attendant expense and to ask the Court of Session to make a declaration that he has been breaking the law in a manner which the Legislature has said subjects him to a penalty, and, then, having proved that he has rendered himself liable to a penalty, to ask the Court of Session to interdict him, with this result, that if he were to offend again he would not be subject to the summary procedure and the £20 penalty, but would be liable to imprisonment for breach of the interdict?

My Lords, it seems to me, I confess, scarcely necessary to do more than state the contention to shew that it is impossible that it can be supported. If that be the law, the number of cases must have been almost innumerable in which such a proceeding would have been competent, and yet it is absolutely unheard of. I will not dwell upon the grave inconveniences which would result from sanctioning a procedure of that description. The mode of procedure and the amount of penalty are often regarded by the Legislature as of the utmost importance when they are creating new offences, and the law would, I believe, contrary to their intention, be most seriously modified if it were held that the party committing a breach of that which for the first time is made an offence were to subject himself by so doing to proceedings of this description which might result in a committal to prison.

For these reasons, I think that this action was not competent. It is not necessary to decide whether there are any cases in which a declaration might be asked. The only declaration asked here is a declaration of the law contained in the 4th subsection of sect. 1, and a declaration that the defender has broken the law. That is the only declaration asked for. Obviously the sole object of the action is an interdict.

Although not on the grounds on which the Court below have proceeded, I concur in the result that the action cannot be maintained, and move your Lordships that the appeal be dismissed. Although I differ, and I believe all your Lordships differ, from the Court below in the grounds upon which you are dismissing the action, yet I do not think it ought to make any difference with regard to the costs, because, for the reasons I have given, I think that the proceedings ought never to have been taken; that the defender might well defend himself on any ground that he could; and that, therefore, the appeal should be dismissed with costs.

LORD WATSON:—

I am of the same mind with the Lord Chancellor on both the points which he has discussed. I agree with the noble and learned Lord that it is impossible to sustain the judgment of the Second Division upon the grounds which have been assigned for it, but that the judgment is right upon a ground which was pointed out by Lord Young at the close of the advising.

It appears to me that were the House to sustain the present action as a competent one it might lead to very unfortunate results. In reality this is a case in which the interference of the civil tribunal was invoked for the purpose of repressing that which the Legislature intended should be dealt with as a crime. I do not think it was intended by the Act of 1888 to create in the patent agents whose names are on the register a right which they could defend against those who use the term "patent agent" without having their names on the register, by means of a resort to the Court of Session. On the contrary, I think it was the plain meaning of the Legislature that when a man whose name was not on the register chose to hold himself forth as a patent agent, the full measure of punishment to be inflicted upon him should be a fine within the sum limited, viz., twenty pounds, to be fixed by a summary court of criminal jurisdiction. There is a mass of statutes regulating sanitary and other improvements for the benefit of the general public, which every neighbouring member of the public has a certain interest in seeing enforced, as to which it would never do to permit the civil Courts to adjudicate. It is clear, upon the face of such legislation, that breaches of those laws were intended to be dealt with simply as a matter of police regulation, to be punished by a fine. Here, in the Act of 1888, the main intention of the Legislature appears to have been to protect poor inventors from being robbed by unskilled patent agents who failed to make a specification and claim in such a form as would secure to them the fruits of their invention.

Upon the other point, looking to the view which your Lordships take of the incompetency of this suit, it is certainly not necessary for its decision to observe upon the grounds which found favour with the learned judges of the Second Division; but I concur with your Lordships in thinking that, although the question does not arise in this case for judicial determination, still, seeing that the point has been decided in the Court below, and that we have heard full argument upon it, it is right that your Lordships should express an opinion. I must say that, for my own part, I have felt very little difficulty in rejecting the view which commended itself to the learned judges of the Court below.

The 1st section of the Act of 1888, by sub-sect. 1, imposes a prohibition upon persons whose names are not on the register against using the description of "patent agent"; and the next sub-section lays upon the Board of Trade the duty of making by-laws or regulations for establishing and maintaining a register of patent agents; those who had been patent agents before the date of the Act having their names inserted, as a matter of course, if they complied with the regulations; those who were not in that position, and who were subsequently admitted, having their qualifications tested by examination, or in some other mode.

Now, it appears to me that the whole scheme was left to the discretion of the Board of Trade; and it is impossible for me to say that, looking to those regulations, the Board of Trade have in any measure exceeded that discretion. It was by their opinion, not by any judicial opinion, that the matter was to be determined. The Legislature retained so far a check that it required that the regulations which they framed should be laid upon the table of both Houses; and of course these regulations could have been annulled by an unfavourable resolution upon a motion made in either House. But what is to be the effect if no such motion be made or carried, or if a motion hostile to the scheme be made in both Houses and rejected by both? The statute makes no difference between these cases. The views expressed by the learned judges in the Court below, so far as I understand them, would in the latter case make it competent for the Court to inquire at its own hand whether or not the board had kept within the statute although the Legislature had declined to interfere.

But I think that all doubt upon that subject is entirely removed by the terms of sect. 101 of the Act of 1883, which for all practical purposes is incorporated with sect. 1 of the later Act. "Any rules made in pursuance of this section," in applying the earlier statute to the later, must be read as, "Any rules made in pursuance of sect. 1, sub-sect. 2, of the Act of 1888"; and assuming that the regulations before us were made by the Board of Trade in pursuance of sect. 1, sub-sect. 2, of the Act of 1888, then in that case these words apply: "shall be of the same effect as if they were contained in this Act, and shall be judicially noticed." My Lords, in regard to those words which I have just read, I do not think I can express my opinion more clearly than by saying that I think they mean exactly what they say. Such rules are to be as effectual as if they were part of the statute itself.

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Lord Morris:—

I am quite of the same opinion as the noble and learned Lords who have preceded me, viz., the noble and learned Lord upon the Woolsack, and my noble and learned friend opposite, on the two main propositions—first, that the action was incompetent, as being brought by persons who had no right to an interdict; and, secondly, that the general rules made by the Board of Trade in this case are intrà vires and come within the powers conferred upon them by sect. 1, sub-sect. 2, of the Act of 1888, combined with sect. 101 of the Act of 1883.

I could add nothing usefully, and therefore would not waste your Lordships' time by saying more, except that I cannot go to the further proposition which, as I understand, the noble and learned Lord on the Woolsack has laid down, that it is not competent for the Courts of Justice to consider whether these general rules are intrà vires or ultrà vires. I am of opinion that it is not alone competent for the Courts of Justice to consider, but that it is their duty to consider, whether the rules are ultrà vires; that there is no power delegated by the Legislature to the Board of Trade to make any general rules which, when made, are to be considered intrà vires provided they are laid before both Houses of Parliament, and provided that nobody has taken the trouble either to read them or to make any motion upon the subject.

Sub-sect. 2 of sect. 1 of the Act of 1888, which has been repeatedly referred to, enacts: "The Board of Trade shall as

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soon as may be after the passing of this Act and may from time to time make such general rules as are in the opinion of the board required for giving effect to this section, and the provisions of sect. 101 of the principal Act shall apply to all rules so made as if they were made in pursuance of that section." Sect. 101, sub-sect. 3, which is to be read with that, is: "General rules may be made under this section at any time after the passing of this Act, but not so as to take effect before the commencement of this Act, and shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act and shall be judicially noticed." Now, I admit that the words are very strong; the general rules are to have the same effect as if they were embodied in the Act: I accede to that. But what general rules? General rules which are made for "giving effect" to that section; not all general rules—there is no such power in my opinion given to the Board of Trade. What are the general rules which are to have the same effect as if they were contained in the Act? The general rules made under the section—general rules such as the Legislature has, under sect. 101, delegated to the Board of Trade the authority of making. But if a Court of Justice (before whom all these questions must ultimately come) considers that certain rules are rules which do not come within this section, in my opinion they would be ultrà vires, and it would be the duty of the Court not to regard them as operative. As regards the question of their receiving any further sanction from the fact of their being laid before both Houses of Parliament. That is a matter of precaution; they do not receive any imprimatur from having been laid before both Houses of Parliament; it is only that an opportunity is given to somebody or other, if he chooses to take advantage of it, of moving that they be annulled. It is a precaution which in ninety-nine cases out of a hundred would be practically a sufficient precaution; but with reference to the abstract proposition which was queried in the judgment of the Master of the Rolls which has been cited, I have arrived at the conclusion that if the rules were not such rules as it was contemplated the Board of Trade should have the authority of making under the sections giving them the authority of making rules, it was the duty of the Court to determine that they were ultrà vires.

Lord Russell of Killowen :—

I agree in the conclusion at which your Lordships have arrived.

In the facts of this case, I think the second plea of the respondent is a good answer to the action, on the ground that the remedy is not injunction but summary prosecution under sect. 1, sub-sect. 4, of the Act of 1888. As to the broader questions, I think the rules are intrà vires, and are therefore valid and binding, even apart from the provision in sect. 101 of the Act of 1883, which is incorporated in and made part of sect. 1, sub-sect. 2, of the Act of 1888, namely, that the rules made are to have effect as if contained in the Act itself. But further, I think that if the rules are to be read as part of the Act (as I think they ought to be) it is not, in this case, competent to judicial tribunals to reject them. Such effect must be given to them by judicial construction as can properly be given to them taking them in conjunction with the general provisions of the Act or Acts of Parliament in connection with which they have been formulated.

A. Graham Murray, Q.C. :—The judgment as it stands is one of absolvitor. The judgment of the House would lead to a judgment of dismissal.

Lord Watson :—

It ought not to be an absolvitor. The proper form is, "Recall the decree of absolvitor and remit to the Court below to dismiss the action."

Ordered,—That the interlocutor of the 26*th of January*, 1893, *be varied by deleting the words "Assoilzie the defender from the conclusions of the action," and inserting in lieu thereof the words, "Dismiss the action." Further ordered, that the said interlocutor of the* 26*th of January*, 1893, *subject to such variation, and also the said interlocutor of the* 22*nd of February*,

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1893, *be affirmed: And it is ordered, that the cause be remitted back to the Court of Session, to do therein as shall be just and consistent with this variation and judgment: Further ordered, that the appellants pay to the respondent the costs incurred in respect of this appeal.*

Lords' Journals, 11th June, 1894.

Agents for the appellants: *George Beloe Ellis, and J. H. & J. Y. Johnson, for Davidson & Syme, W.S., Edinburgh.*

Agents for respondent: *Mann & Taylor, for Borland, King, & Shaw, Glasgow, and Dove & Lockhart, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

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BLACK . . . . APPELLANT;

AND

CLAY . . . . RESPONDENT.

Agricultural Holdings (Scotland) Act, 1883 (46 & 47 *Vict. c.* 62), *ss.* 2, 7, 28—*Lease — Compensation for Improvements — Notice — "Determination of Tenancy."*

Sect. 2 of the Agricultural Holdings (Scotland) Act, 1883 (46 & 47 Vict. c. 62), confers upon a tenant of agricultural or pastoral lands, "on quitting his holding at the determination of a tenancy," the right to obtain from his landlord compensation for certain improvements. It is provided by sect. 7 that a tenant shall not be entitled to compensation under the Act, unless "four months at least *before the determination of the tenancy* he gives notice in writing to the landlord of his intention to make a claim." The only difference in sect. 7 of the English Agricultural Holdings Act, 1883, is, that the notice required is two months instead of four.

The appellant, owner of a farm in Scotland, obtained a decree ordering the respondent, the tenant, to remove (following the stipulations in the lease) from the houses, grass and fallow land, at the term of Whitsunday, 1892; from the arable land at the separation of the crop of the same year from the ground; and from the barns and barn-yard and two cot-houses at Whitsunday, 1893.

The respondent quitted possession of the houses (with the exception of the barns, barn-yard, and two cot-houses), and also of the grass and fallow

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lands, at the term of Whitsunday, 1892. He thereafter, on the 6th of June, 1892, gave the appellant notice of a claim for improvements:—

Held, affirming the decision of the Court of Session (21 Court Sess. Cas. 4th Series (Rettie), 41), that there were three terms of removal in regard to different portions of the subject-matter of the lease, and that a notice four months before the "separation of the crop" (or its equivalent term Martinmas) after Whitsunday, 1892, was sufficient.

By Lord Watson: the terms of sect. 35 give rise to serious doubts whether the bare possession of a barn, barn-yard, and cot-houses unconnected with any land, pastoral or agricultural, is possession of a "holding" recognised by the Act.

Wight v. *Earl of Hopetoun* (4 Macq. 729) distinguished.

APPEAL from a judgment of the First Division of the Court of Session, Scotland (1).

James R. Black, the appellant, was the landlord of a farm in Berwickshire, and John Clay, the respondent, was the tenant of that farm under a lease for nineteen years, which commenced in 1860. The term of nineteen years was extended for thirteen years beyond that period by tacit relocation. The farm was let in "tack and assedation"; and the stipulations of the lease as regards entry and removal were: "for the space of nineteen years from and after the entry of the said John Clay, which, notwithstanding the date or dates hereof, is declared to be to the houses (with the exceptions after mentioned) grass and fallow land on the 26th of May, in the year 1860; to the arable land in corn crop at the separation of the crop of the same year from the ground; and to the barns and barn-yard and two cot-houses at Whitsunday, 1861, from these periods respectively to be possessed by the said John Clay and his foresaids during the space above written."

The rent was £765 a year, payable half-yearly at Whitsunday and Martinmas. The first payment to be made at Martinmas, 1861, and the second at Whitsunday, 1862.

There was also a clause that "in the last year of this lease the landlord or entering tenant shall have power to sow grass seeds with the said John Clay's way-going crop on that part of the lands which had been summer fallow, turnips, or other drilled green crop in the preceding year, the said John Clay, harrowing or rolling in the same in a proper manner, all without charge: And, moreover, in the last year of this lease, the said John Clay or his foresaids shall, without any claim or compensation, leave to the landlord or entering tenant land for fallow equal to one-third part of the whole land which shall be in tillage in that year, and that in whole fields as near as the size thereof will admit, which fallow land the landlord or entering tenant shall have power to enter to and plough any time after the Martinmas preceding the said John Clay's removal from the pasture lands as aforesaid. . . . And the said John Clay and his foresaids shall consume upon the lands the whole straw, chaff, turnips, and potatoes produced yearly thereon for manure to the same, and all the dung arising therefrom shall be applied to the lands which shall be in summer fallow or green crop; and they shall, without any claim or compensation, leave the whole straw and chaff of the last crop in steelbow upon the farm, together with all the dung made from the crop of the preceding year properly prepared and put together, with liberty to the landlord or entering tenant to cart to the fallow land the said dung at any time during the winter or spring preceding the Whitsunday of removal; and no hay shall be sold off the said lands during the last five years of the lease: And whereas the outgoing tenant is to be allowed the necessary accommodation for threshing and carrying his last crop to market, the said John Clay and his foresaids shall, in addition to the barns, barn-yard, and two cot-houses before referred to, have stable room allowed them for two pair of horses, with the straw required for fodder and litter, without any charge, and that until the term of Whitsunday after their removal from the arable land as aforesaid."

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(1) 21 Court Sess. Cas. 4th Series (Rettie), 41.

In May, 1891, the appellant obtained a decree ordering the respondent to remove (following the terms of the lease) from the houses, grass and fallow land, at the term of Whitsunday, 1892; from the arable land in corn crop at the separation of the crop of the same year from the ground; and from the barns and barn-yard and two cot-houses at Whitsunday, 1893.

The respondent quitted possession of the houses (with the exception of the barns, barn-yard, and two cot-houses), at the term of Whitsunday, 1892, and occupied the rest of the subjects up to the dates given in the decree.

On June 6, 1892, the respondent gave the appellant notice (a previous notice dated January 22, 1892, not being relied on) (1) of a claim for improvements under the 2nd and 7th sections of the Agricultural Holdings (Scotland) Act, 1883 (2), which notice was followed by an application to the sheriff for the appointment of a referee, in terms of sect. 2 of the Agricultural Holdings (Scotland) Act, 1889 (52 & 53 Vict. c. 20). The appellant then instituted this action for interdict to restrain all further procedure towards the assessment of compensation upon the ground that the notice served upon him was not in time under s. 7 of the Act of 1883, his contention being that the lease determined at Whitsunday, 1892, when the respondent ceased to hold the grass and fallow lands, and that his subsequent possession of the arable land was not a possession as tenant, but only a privilege accorded to one whose tenancy was already at an end.

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(1) See the case of *Sinclair* v. *Brown*, 19 Court Sess. Cas. 4th Series (Rettie), 780. Terms of a notice of claim which were held to be insufficient.

(2) Sect. 2 of the Agricultural Holdings (Scotland) Act, 1883 (46 & 47 Vict. c. 62), confers on a tenant of agricultural or pastoral lands, "on quitting his holding at the determination of a tenancy," the right to obtain from his landlord compensation for certain improvements.

Sect. 7 provides that a tenant "shall not be entitled to compensation under this Act unless four months at least before the determination of the tenancy he gives notice in writing to the landlord of his intention to make a claim for compensation under this Act."

Sect. 28 provides that, "Notwithstanding the expiration of the stipulated endurance of any lease, the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end: (*a*) in the case of leases for three years and upwards, not less than one year, nor more than two years, before the termination of the lease; (*b*) in the case of leases from year to year, or for any period less than three years, not less than six months before the termination of the lease."

Sect. 35: "Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral."

Sect. 42: "Determination of tenancy" means the termination of a lease by reason of effluxion of time, or from any other cause.

Sect. 7 of the English Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), differs only from the Scotch Act in that the notice required is two and not four months.

And the interpretation of "Determination of tenancy" in the English Act (s. 61) was that it "means the cesser of a contract of tenancy by reason of effluxion of time, or from any other cause."

The question fell to be determined in exactly the same way as if the last year of the tenancy had been the last year of the original lease, and was not affected by the tacit continuation of the lease.

On November 7, 1893, the First Division of the Court of Session, adhering to the judgment of the Lord Ordinary, refused the interdict asked for by the appellant. (1)

On appeal,

April 26, 27. *The Lord Advocate* (*J. B. Balfour*, Q.C.), and *Salvesen* (of the Scotch Bar), for the appellant:—

The determination of the lease was Whitsunday, 1892. For anything that appears, the "separation of the crop" period might be before Martinmas, and such period was therefore not a definite time. *Wight* v. *Earl of Hopetoun* (2) decided that a right to reap the waygoing crop was not a right of possession, but a right to come on the land for that purpose only—i.e., a privilege. The incoming tenant at Whitsunday has as large an interest in the farm as the outgoing tenant. He has, among others, the right to sow grass seeds with the corn. The cases referred to in the Court below were *Hunter* v. *Barron's Trustees* (3), *Strang* v. *Stuart* (4), and the English case of *In re Paul* (5). They are in favour of the appellant's view. Sect. 28 of the Act provides, in the case of a lease from year to year, that not less than six months before the determination of the lease notice is to be given to determine the lease. If it were decided that Martinmas was the termination of this case of tacit relocation from year to year, then the section would be satisfied by giving notice at Whitsunday, or on the day the outgoing tenant had his sale and left the house and grass lands. This would defeat the

(1) 21 Court Sess. Cas. 4th Series (Rettie), 41.

(2) 4 Macq. 729.

(3) 13 Court Sess. Cas. 4th Series (Rettie), 883.

(4) 14 Court Sess. Cas. 4th Series (Rettie), 637.

(5) 24 Q. B. D. 247.

object of the section, which was that either party might make arrangements for the future. Certainly Whitsunday, 1893, cannot be the determination of the lease. For if the barns, barnyard, and cot-houses had been the only subject-matter of the demise, sect. 35 shews that such a lease would not entitle the tenant to make any claim for compensation, inasmuch as the holding would not be within the description "either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral." There may be a custom in Berwickshire to give the use of the barns to the outgoing tenant to get in and dispose of his off-going crops.

Asher, Q.C. (with him *J. J. Cook*, of the Scotch Bar, and *Mark Napier*), for the respondent, were not heard on the main point, but to cite their authorities:—

There is no case deciding that the common law gives the tenant the right of occupation of the barns, &c.: *MacEwan* v. *Paterson* (1); *Gatherer* v. *Cumming's Executors* (2); and, therefore, the tenant having under this lease a right to occupy a substantial part of the subject; until he was removed from those parts, the determination of the tenancy did not occur. The old English case of *Lewis* v. *Harris* (3) was decided on the same grounds as *In re Paul* (4). As to sect. 28, it forms a different branch of the statute, and may have been inserted to silence unquiet minds. It means, if there is one determination of the lease, that it is necessary in order to prevent tacit renewal that six months' notice must be given before such determination; but where there are several determinations, it does not follow by analogy that notice under sect. 7 must be given before the first.

Judgment after consideration.

LORD HERSCHELL, L.C.:—

The question raised by this appeal is whether the respondent is disentitled to compensation under the Agricultural Holdings

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(1) 1803. Mor. Dict. 13,891; Hume's Dec. 571.

(2) 8 Court Sess. Cas. 3rd Series (Macpherson), 379.

(3) 1 H. Bl. 7, n.

(4) 24 Q. B. D. 247.

(Scotland) Act, 1883, by reason of his not having "four months before the termination of the tenancy" given notice to the landlord of his intention to make a claim for compensation under that Act, as required by the provisions of sect. 7.

The lease under which the respondent held commenced in 1860, and was for a term of nineteen years, but it has since been extended by tacit relocation. By the lease the lessors set and in tack and assedation let to the lessees all and whole the farm and lands of Winfield for the space of nineteen years "from and after the entry of the said John Clay, which, notwithstanding the date or dates hereof, is hereby declared to be to the houses (with the exceptions after mentioned), grass and fallow land on the 26th day of May in the year 1860, to the arable land in corn crop at the separation of the crop of the same year from the ground, and to the barns and barn-yard and two cot-houses at Whitsunday, 1861, from these periods respectively to be possessed by the said John Clay and his foresaids during the space above written."

It will be observed that the term runs from the entry of the tenant, which, as to part of the farm, is to be on the 26th of May, 1860; as to other part on the separation of the crop; and as to the residue of the subjects comprised in the letting, on the 26th of May, 1861; and that these several subjects are to be possessed by the tenant during the space of nineteen years "from these periods respectively." At what period did the tenancy determine under these circumstances within the meaning of the section to which I have referred?

It was contended for the appellant that it determined at Whitsunday, 1892, when the tenant ceased to hold the grass and fallow lands, and that his subsequent possession of the arable land was not a possession as tenant, but only a privilege accorded to one whose tenancy was already at an end. In support of that contention reliance was placed on the opinions expressed in this House in the case of *Wight* v. *Earl of Hopetoun* (1). In that case (where the terms of the lease, so far as regards the grass and arable lands, were very similar to the present) the tenant was entitled to a new term on giving to the landlord notice that he required it "at least twelve months before the expiry of the above term of nineteen years." No more was determined in that case than that the notice given was ineffectual, inasmuch as it was not given twelve months before the term had expired as to a part of the lands held. But there is no doubt that opinions were expressed by noble and learned Lords, especially by Lord Westbury, which give some colour to the contention urged in the present case. That noble and learned Lord said (1): "According to the common law or custom of Scotland, if a lease be granted to a new tenant of a farm partly of arable and partly of meadow or pasture land, for a term of years to commence from Whitsunday, such tenant is entitled to enter on the grass or meadow land immediately on the commencement of the tack; but the outgoing tenant is entitled to continue in possession of such arable lands as are sown until the separation of the crop from the ground. Still, the lease commences and the term of years runs and is computed in law from Whitsunday, both as to grass and arable, although the common law or custom allows the outgoing tenant to reap and carry away off-going crop, and gives him a limited right of entry and occupation for that purpose."

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(1) 4 Macq. 729.

I own I have some little difficulty in reconciling the opinion thus expressed with the language used in the lease then under consideration. But in the present case it appears to me to be impossible to adopt the construction contended for. The barns, and barn-yards, and two cot-houses are to be possessed for nineteen years from the Whitsunday subsequent to the entry on the grass lands. It is not pretended that any such right as this exists "according to the common law or custom of Scotland," which was the foundation of Lord Westbury's opinion, that in the case of the arable lands no tenancy existed, but a mere permissive possession when the term, as to the grass lands, had come to an end. It appears to me impossible to avoid the conclusion that, as to the barns, barn-yard, and cot-houses a tenancy is created a year later and terminates a year later than the tenancy of the grass lands; and if there be a separate ish as to these, how can the lease be construed otherwise than as creating

(1) 4 Macq. at p. 731.

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a tenancy in the arable lands which is to continue until the "separation of the crop" after the Whitsunday? The words of the demise are the same with regard to all three subjects, which are to be possessed for the space of nineteen years from the periods named "respectively."

For these reasons, I cannot but come to the conclusion that the contention that under the lease there was to be one ish, and that as from the Whitsunday when the tenancy of the grass lands came to an end, cannot be supported.

That seems to me to be sufficient to dispose of the appeal. The appellant in his pleadings rests his case upon the ground that the requisite notice was not given four months before that date. It is true that before the Lord Ordinary the appellant contended that the actual date when the crop was separated must be ascertained; but it may be doubted whether this was open to him upon the pleadings; and any such point was abandoned in the Inner House.

It is not necessary to determine whether when the ish as to the arable land is to be "the separation of the crop," that is to be regarded as synonymous with the Martinmas term, so that the notice would be in time if given four months before "Martinmas," or whether in the case of the present lease the notice would be in time if given before the ish as to the barns, barn-yard and cot-houses when the tenancy comes completely to an end. I understand that my noble and learned friend, Lord Watson, is of opinion that the former is the correct view. There is an obvious convenience in such a conclusion, and I do not desire to be understood as expressing any dissent from it.

I do not feel pressed by the difficulty suggested in argument with regard to the period prior to which a notice must be given under sect. 28 of the Act in order that the lease may not be renewed. It may well be that having regard to the object in view the prescribed notice under that section must be given prior to the first ish, where several are provided for by the lease. It does not follow that where there is more than one ish the notice required by sect. 7 must be so given.

I think, therefore, that the interlocutor appealed from should be affirmed, and the appeal dismissed with costs.

Lord Watson:—

The appellant, who is proprietor of the farm of Winfield, in the county of Berwick, in May, 1891, obtained a decree ordaining the respondent to remove from the houses (with the exception after mentioned), grass and fallow land, at the term of Whitsunday, 1892; from the arable land at the separation of the crop of the same year from the ground, and from the barns and barn-yard and two cot-houses at Whitsunday, 1893. The respondent was tenant under a lease which commenced in 1860. The original term of the lease was for nineteen years; but it was extended for thirteen years beyond that period, by tacit relocation. The decree of removing was in conformity with the stipulations of the lease in regard to entry and ish. The farm was thereby let "for the space of nineteen years from and after the entry of the said John Clay, which, notwithstanding the date or dates hereof, is declared to be to the houses (with the exceptions after mentioned), grass and fallow lands on the 26th day of May in the year 1860, to the arable land in corn crop at the separation of the crop of the same year from the ground, and to the barns and barn-yard and two cot-houses at Whitsunday, 1891, from these periods respectively to be possessed by the said John Clay and his foresaids during the space above written." It is, in my opinion, material to notice, that the three portions of the entire farm, for which different times of entry are assigned, are each of them set "in tack and assedation," and are to be possessed by the tenant, for the full period of nineteen years from and after their respective dates of entry.

Sect. 2 of the Agricultural Holdings (Scotland) Act, 1883 (46 & 47 Vict. c. 62), confers upon a tenant of agricultural or pastoral lands, "on quitting his holding at the determination of a tenancy," the right to obtain from his landlord compensation for certain improvements. It is provided by sect. 7, that a tenant shall not be entitled to compensation under the Act, unless "four months at least before the determination of the tenancy, he gives notice to the landlord in writing of his intention to make a claim."

The respondent quitted possession of the houses (with the exception of the barns, barn-yard, and two cot-houses), and also of the grass and fallow lands, at the term of Whitsunday, 1892. He thereafter, on the 6th day of June, 1892, gave the appellant notice of a claim for improvements under the provisions of the Act of 1883, which notice was followed by an application to the sheriff for the appointment of a referee, in terms of sect. 2 of the Agricultural Holdings (Scotland) Act, 1889 (52 & 53 Vict. c. 20). The appellant then instituted the present process of suspension and interdict before the Court of Session, in order to restrain all further procedure towards the assessment of compensation, upon the ground that the notice served upon him did not comply with the requirements of the 7th section of the Act of 1883.

The Lord Ordinary (Low) refused the interdict; and his decision was unanimously affirmed by the learned judges of the First Division. In the Outer House, the appellant maintained that the actual date at which the last of the respondent's crop of 1892 was separated from the ground constituted the determination of his tenancy, within the meaning of the statute; and he contended that a proof ought to be allowed for the purpose of fixing that date. The Lord Ordinary held that such inquiry was unnecessary, being of opinion that the term of Martinmas must be taken as the ish, for the arable lands under crop in the year 1892. His Lordship said: "I think that an ish at the separation of the crop is practically a Martinmas ish. The rent of a farm is due for the crop and possession of each year separately, and the term of Martinmas is regarded as the end of one crop year and the beginning of another. It is assumed, on the one hand, that the crop will be secured by Martinmas; and on the other hand, the tenant has up to Martinmas to secure the crop. No doubt, if the crop is secured before Martinmas, the incoming tenant could not be refused access to the land for the purpose of ploughing, but the outgoing tenant is entitled to exercise his discretion as to the most suitable time for gathering the harvest; and accordingly it is not uncommon that the ish and entry of arable land is made 'at the separation of the crop *or* Martinmas,' the two terms being used as synonymous."

When the case went to the Inner House, the appellant adopted a new line of argument. He there maintained that the possession had by the respondent after Whitsunday, 1892, for the purpose of reaping and ingathering his crop, did not constitute tenancy, but merely amounted to a privilege accorded to a tenant by the common law, which was not altered in legal character by its introduction into the lease in the form of a stipulation. That was also the chief, if not the only, argument submitted for the appellant at your Lordships' Bar; and it was mainly rested upon the decision of this House in *Wight* v. *Earl of Hopetoun* (1). In that case the lease expired, as to houses and grass, at Whitsunday, and, as to arable land under crop, at its separation, the landlord being under an obligation to grant a new term, upon a notice, by the tenant demanding renewal, "at least twelve months before the expiry *of the above term of nineteen years*." The only question was, whether the specific term of nineteen years, which the contracting parties had in view, was to run from the Whitsunday of entry to the Whitsunday of ish, as to houses and grass, or from the later date of entry to the arable lands till the time of the tenant leaving them. It was held by the House, affirming the judgment of the Court of Session, that Whitsunday was the term which the parties contemplated for the expiry of the nineteen years, and that the tenant, having failed to give notice twelve months before that term, was not in a position to demand a renewal of his lease.

I cannot regard the decision in *Wight* v. *Earl of Hopetoun* (1) as establishing the principle contended for by the appellant, which appeared to me to be this: that no words of demise will be sufficient to create a tenancy of arable lands under crop, after houses and grass lands are surrendered to the landlord, so long as the demise is made for the sole purpose of enabling an outgoing tenant to tend his crop, and reap it at maturity. The proposition is, to my mind, not altogether intelligible, because the quality of the possession had by an outgoing tenant of land under crop, after he has flitted from houses and grass lands at Whitsunday, differs, so far as I am aware, in no single particular from the possession of lands under crop which he had enjoyed during the previous years of the lease, which was admitted to be possession under his tenancy. No such general question was really involved in the decision of *Wight* v. *Earl of Hopetoun* (1).

(1) 4 Macq. 729.

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That it was not the intention of the noble and learned Lords who gave judgment in that case to negative the possibility of a double ish, one for houses and grass, and another for land under crop, appears from the judgment of Lord Wensleydale, who said (1): "If it is a lease with a double termination, one for the houses and grass land, and the other for the arable, I am clearly of opinion that the majority of the judges have come to the right conclusion."

The leading judgment in this case was, in the First Division, delivered by Lord M'Laren. The Lord President concurred in the views expressed by his Lordship, and in the additional observations which were made by Lord Kinnear. Lord M'Laren was of the same opinion with the Lord Ordinary in regard to the proper construction of the time indicated in the lease as the separation of the way-going crop from the ground. Upon that point his Lordship observed: "The reason why the expression 'separation of the crop' is used in the clauses relating to entry and removal, is that the incoming tenant may have access to each field as soon as its crop has been ingathered, and shall not be liable to be kept out of possession by a troublesome outgoing tenant in the assertion of a theoretical right to retain possession until Martinmas. But this construction is quite consistent with Martinmas being the autumnal term, wherever it is necessary that something to be done in fulfilment of the lease should be referred to a definite day—payment of rent being a clear case in point. I have therefore no difficulty in holding that, where notice has to be given, four months before the autumnal term, the term of Martinmas is the time from which the period of four months is to be reckoned."

I entertain little doubt that the contract embodied in the lease before us makes effectual provision for three terms of entry, and three terms of ish, in regard to different portions of the subjects let; and that, until the arrival of each term of ish, a proper right of tenancy exists with respect to such part of the subjects let as the tenant is bound to quit possession of at that term. I am also of opinion with the learned judges of both Courts below, and for substantially the same reasons, that, in cases like the present,

(1) 4 Macq. at p. 738.

the expression "separation of the crop" ought to be read as signifying the term of Martinmas. I venture to think that, whether tested by reference to their popular meaning, or to their legal effect, "separation of the crop" and "the Martinmas term" are equivalent expressions when they occur in a Scotch lease. When the arable ish is Martinmas, the outgoing tenant could not prevent his successor from ploughing, before that term, land from which his crop had been removed; nor, in the case of a late harvest, could his successor prevent him from reaping his crop after the term. And, in my opinion, whichever of these expressions be used in the lease, it must be taken to mean the actual term of Martinmas, in all cases where the contractual rights of landlord or tenant are made to depend upon their giving a previous notice. Upon any other interpretation, many conditions, to be performed after Whitsunday at a time previous to, and dependent upon, the date of the tenant's removal from lands under crop, would become inextricable.

Assuming the right construction of the lease to be that which I have indicated, the question still remains, which of the three periods of ish ought to be regarded, for the purposes of this appeal, as the determination of the respondent's tenancy within the meaning of sects. 2 and 7 of the Act?

The definition which the Act gives of the expression "determination of tenancy" is not definitive for all purposes. It is defined (sect. 43) as meaning "the determination of a lease by reason of effluxion of time, or any other cause." That explanation affords no aid in ascertaining whether the punctum temporis from which the time for giving a notice, to be calculated retro, is the first, the second, or the last term of removal. That is a question which, in my opinion, must be decided according to the nature and object of the notice; and I can detect no inconsistency in holding that, in one section of the Act requiring notice, the beginning of removal, and that in another the final removal of the tenant may be contemplated.

In this case I have come to the conclusion that the "determination of a tenancy," as that expression occurs in sects. 2 and 7 of the statute, refers to the time when the tenant finally gives up possession of the subjects which in the statute are described as his "holding." Sect. 2 is framed upon the assumption that his quittance of his holding and the determination of his tenancy are to be, in point of time, co-incident. A holding which entitles the tenant to the benefit of its provisions must, according to sect. 35 of the Act, be "either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral." The respondent's holding, in so far as it consisted of lands in crop after Whitsunday, 1892, was agricultural, and that is, in my opinion, sufficient for the disposal of this appeal. But I entertain serious doubts whether, after his removal in the autumn of 1892, the respondent remained in possession of any holding within the meaning of the Act. I do not think that the bare possession of a barn, barn-yard, and two cot-houses, unconnected with any land either pastoral or agricultural, is possession of a holding recognised by the Act. That view of its provisions does not appear to me to be in the least inconsistent with the main object of the Act, which obviously was to confer certain benefits upon an outgoing tenant. He can have no practical difficulty in intimating his claim of compensation for improvements four months before Martinmas. To postpone that intimation until four months before the following Whitsunday, when he cedes possession of subjects neither agricultural nor pastoral and not required for any purpose connected with lands agricultural or pastoral, would, in my opinion, be unnecessary, and would suspend for six months his right to recover moneys which he had previously expended for the benefit of his landlord or successor in the tenancy. Not only so, but in so far as concerns the bulk of the statutory improvements specified in part 3 of the schedule, to which the consent of the landlord is not required, it would be difficult, if not impossible, for the landlord to check, or for an arbiter to assess satisfactorily the amount of the tenant's claim, if the time for giving notice were extended to the 15th of January following the tenant's removal from lands under crop.

For these reasons I am of opinion that the interlocutors appealed from ought to be affirmed with costs.

My noble and learned friend Lord Shand, who heard the argument in this appeal, is unable to be present to-day; but his Lordship has requested me to state that the opinions which I have expressed have been carefully considered by him and have his entire concurrence.

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LORD MORRIS:—

I have had an opportunity of reading the reasons which have been assigned by my noble and learned friend, Lord Watson, for his judgment, and I desire to express my entire concurrence.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, June 22, 1894.

Agents for appellant: *Adam Burn & Son, for H. & H. Tod, W.S., Edinburgh.*

Agents for respondent: *Andrew Wood & Co., for Pringle, Dallas & Co., W.S., Edinburgh.*

[HOUSE OF LORDS.]

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LOUISA HEWLETT (PAUPER) . . . . . APPELLANT;

AND

SAMUEL ALLEN (TRADING AS F. ALLEN & SONS) . . . . RESPONDENT.

Master and Servant—Wages—Payment otherwise than in Current Coin—Deductions for Sick and Accident Club—Truck Act (1 & 2 *Wm.* 4, *c.* 37), *ss.* 1, 2, 3, 4, 24.

A payment made by an employer, at the instance of a person employed, to discharge some obligation of the person employed, or to place the money in the hands of some person in whose hands the person employed desires it to be placed, is within the meaning of sects. 3 and 4 of the Truck Act (1 & 2 Wm. 4, c. 37) a payment to the person employed as much as if the current coin of the realm had been placed in his or her hands.

The appellant entered the service of the respondent and signed an agreement to conform to all the rules and regulations of the respondent's works. One of the regulations was that all employés were to become members of the sick and accident club. In accordance with the rules of this club weekly payments were made to the club treasurer, and from the fund thus established relief was given to the members in case of sickness or accident. The appellant received each week a ticket shewing the gross amount of wages due to her and the weekly deduction on account of the payment to the club, the balance alone being paid to her. She never required and never received any relief from the fund. After leaving her employment the appellant brought under sect. 4 of the Truck Act an action against the respondent to recover the amount of the weekly payments to the club thus deducted from her wages:—

Held, that within the meaning of sects. 3 and 4 of the Truck Act the entire amount of the wages payable to the appellant had been actually paid to her in the current coin of the realm, and that she was not entitled to recover from the respondent the amount of the deductions:

Also, that even assuming (but without deciding) that there was in this case a contract which was made illegal, null and void by sect. 2 of the Truck Act, the respondent by making the weekly payments to the club with the assent of the appellant had discharged his obligations to her.

The decision of the Court of Appeal ([1892] 2 Q. B. 662) affirmed.

APPEAL from an order of the Court of Appeal (Lord Esher M.R. and Bowen L.J.) (1) affirming a judgment of the Queen's Bench Division. The facts are stated in the judgment of Lord Herschell L.C.

April 27; May 4. *W. S. Robson* Q.C., and *Corrie Grant* (*W. Compton Smith* with them) for the appellant:—

The contract was in breach of sects. 1, 2, 3 and 4 of the Truck Act 1831. It is admitted by Bowen L.J. in his judgment that the wages were not paid "in the current coin of this realm only," and that therefore the contract was "illegal, null and void." Such a contract cannot be the foundation of a counter-claim or set-off. The first three sections are comprehensive in their prohibition of any form of payment except in money, and of any deduction. Sect. 4 goes further and enables the servant to recover so much of the wages as shall not have been actually paid in coin. Sect. 5 forbids any set-off in respect of goods, wares or merchandise supplied by the employer or by any establishment in which the employer has a pecuniary interest. Sect. 23 on the other hand permits a particular set-off, viz. in respect of a contract signed by the artificer for the supply to him of medicine or medical attendance. This allowance of a particular set-off rebuts the inference drawn from sect. 5 that the prohibition of one set-off permits others by implication. The

(1) [1892] 2 Q. B. 662.

correct inference is that no set-off is allowed except what is expressly mentioned in the Act. The object of the legislation was to secure that a workman's wages should be paid into his hands in coin without deduction.

[LORD WATSON:—What is there to prevent a man's giving an order on his wages? Must the money be handed to him over the counter?]

Certainly—otherwise the Act would be easily evaded. There was an actual deduction from wages, in pursuance of a contract between the parties. Whatever was done was done under that contract, and no request on the part of the appellant can justify what the Legislature has expressly forbidden.

Finlay Q.C. and *Crispe* for the respondent:—

The Act must be reasonably construed. If the appellant's argument were sound the rule providing that the workpeople shall be decently dressed, have clean aprons every week and so on would be illegal. Sect. 2 is expressed in general terms, but has no application. A friendly society such as this is not within the mischief of the Act. There is no deduction here for "goods, wares or merchandise." Strictly there was no deduction at all, but an application by desire of the appellant of a fraction of her wages for her own benefit. All the sections must be read in the light of the evil which the Legislature intended to remedy.

[LORD HERSCHELL L.C. referred to *Ex parte Cooper* (1).]

Lord Selborne's observations in that case are in the respondent's favour. But whatever construction of the contract may be adopted, the appellant is bound by acquiescence. The case comes within the words of Lord Campbell L.C. in *Cairncross* v. *Lorrimer* (2): "If a man either by words or by conduct has intimated that he consents to an act which has been done and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they might have abstained, he cannot question the legality of the act he had so sanctioned to

(1) 26 Ch. D. 693, 698.

(2) 3 Macq. 827.

the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."

Robson Q.C. replied.

The House took time for consideration.

May 7. LORD HERSCHELL L.C. :—

My Lords, the facts of this case are very simple, and may be shortly stated, but the point raised is one by no means free from difficulty.

The appellant, who was plaintiff in the action below, entered several times into the service of the defendants, who are the respondents at the Bar; first in the year 1886, again in the year 1888, and again in the year 1890. On each occasion the appellant entered into an agreement with her employers, which was signed by her, "to conform to all the rules and regulations of Messrs. F. Allen & Son's works and to submit to the penalties for breach of the same, a copy of which rules and regulations was given me at the time of signing this." Then follows the signature of the appellant. One of the rules to which she so agreed to conform was in these words: "All employés will have to become members of the sick and accident club." It appears that there was a sick and benefit society established in connection with the employment for the benefit of employés at Messrs. Allen & Son's works. The rules of that society provided that the contributors to the fund were to "consist of all employed in the works, who" were to be "divided into five classes," and according to the class was the amount of weekly subscription, varying from *5d.* down to 1½*d.*, and also the amount of "weekly relief in case of sickness or accident," varying from 12*s.* down to 3*s.*, and "death money," varying from eight guineas down to two guineas. The subscription was to "include doctor's attendance free within three miles unless members" were "able to call at his surgery." By another rule "a member of the firm" was "to act as treasurer, and the club," was to "have its own committee of management of twenty members" who were to "conduct all the business of the club, their services rendered being gratuitous."

In accordance with these rules it was the practice for a weekly payment to be made to the treasurer of the fund, and the sums received by him were paid from time to time to a separate account, which was kept at a bank, and in case of sickness or the other cases referred to the members received relief from the fund so established. There was deducted from the plaintiff's wages (in the manner in which I will refer to in a moment) weekly the sum of, at one time 2½*d.*, and at another 3*d.* a week; that is to say, the subscription of the fourth class and the third class. It appears that each week the appellant received a ticket, of which one was produced to your Lordships, shewing the gross amount of wages due, in this particular case 15*s.* 9*d.*, from which was deducted "Fines 2*d.*, sick club 2½*d.*"; so that each week at the time when the appellant received the balance she was made aware that there was being paid by the firm to the treasurer of the sick club this amount of 2½*d.* or 3*d.*, as the case might be, and that payment was made without objection during the whole time that she was in the employ of the respondents.

When she left she received the sum of 3*s.* from the fund, which it appears was the amount to which any member was entitled on ceasing to be in the employ of the employers. Of course, during the whole time she was in their employment she received the advantages of being a member of this sick and benefit club. It was suggested on behalf of the appellant that she had received nothing from the fund except the 3*s.* on leaving it—that that was the only benefit she had derived. I cannot at all concur in that view. Although she in point of fact did not fall ill during the time that she was in their employ, she received the benefit of having secured to her in case she fell ill a considerable weekly payment out of the sick fund. After her employment ceased the present action was brought, and she claimed to recover, less certain deductions with which I need not trouble your Lordships, the total amount that had been in this way weekly paid to the sick club, and in the manner that I have described deducted from the sum which she otherwise would have received from the employers.

My Lords, if it had not been for the provisions of the Truck Act I do not think it can be doubted for a moment that the

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plaintiff would have had no possible claim. The fact that she had become a member of this sick club, and that week by week to her knowledge and with her assent a sum had been paid by the employers on her behalf to the sick fund, which gave her a right to all its advantages, would be a complete answer to any such action. I do not think that was really disputed at the Bar; but the plaintiff's case rested entirely upon the provisions of the Truck Act. It was alleged that she had not received the whole of her wages in the manner in which that Act entitled her to demand them, and that, not having received the whole of her wages, the balance now fell to be paid by her employers.

My Lords, I should state that during a portion of the time when she was first in the service of the employers the character of the employment was not one within the Truck Act. It only came within the Truck Act by reason of the Amending Act of 1887, which brought that particular occupation within it. The Act (1 & 2 Wm. 4, c. 37) is intituled: "An Act to prohibit the payment in certain trades of wages in goods or otherwise than in the current coin of the realm." And the 3rd section enacts: "That the entire amount of the wages earned by or payable to any artificer in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null and void." The 4th section enacts: "That every artificer in any of the trades hereinafter enumerated shall be entitled to recover from his employer in any such trade, in the manner by law provided for the recovery of servants' wages, or by any other lawful ways and means, the whole or so much of the wages earned by such artificer in such trade as shall not have been actually paid to him by such his employer in the current coin of this realm." It is on those two clauses that in the first place the plaintiff founds her action. She alleges that she has not been paid in the current coin of the realm the wages to which she was entitled.

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My Lords, I do not think it can be doubted that the object of this enactment was to strike at the practice which had grown up of employers making their payment in part by the supply of goods in the sale of which they were interested, which it was thought would place the person employed at an unfair disadvantage, and which it was thought was calculated to result in the person employed obtaining something less than the agreed remuneration for services. The contrast in those sections is between payment in current coin of the realm and payment in some other fashion; and I can myself entertain no doubt that a payment made by an employer at the instance of a person employed to discharge some obligation of the person employed, or to place the money in the hands of some person in whose hands the person employed desires it to be placed, is in the sense and meaning of those sections a payment to the person employed as much as if the current coin of the realm had been placed in his or her hands.

It is said that money paid in that way would not be a payment of the debt—that it could not have been pleaded as payment—that the defence must have been one of set-off. My Lords, whether that be so or not, in accordance with the system of pleading which previously prevailed, I do not think it at all necessary to inquire. The distinction between payment and set-off was often a very fine one in old days. But, however that may be as a matter of pleading, I cannot myself doubt, looking at the purpose and object as well as the words of this statute, that a payment made in that fashion would be a payment in the current coin of the realm and not otherwise within the meaning of the Truck Act. The case obviously would not be in the slightest degree within the mischief against which that statute was directed.

I ought also to call attention to the fact that the 5th clause of the statute does prohibit set-off in particular cases. The employer in any action commenced by an artificer for the recovery of wages is not to be allowed a set-off, "nor to claim any reduction of the plaintiff's demand by reason" "of any goods, wares or merchandise had or received by the plaintiff as or on account of his wages," "or by reason of any goods, wares or merchandise sold, delivered or supplied to such artificer at any shop or warehouse kept by or belonging to such employer, or in the profits of which such employer shall have any share or interest." The object of that enactment is obvious; but it does not touch a case of set-off (if it be a case of set-off) of money paid for the person employed at his or her request.

But then it is said that the 2nd clause of the statute enacts: "That if in any contract hereafter to be made between any artificer in any of the trades hereinafter enumerated and his employer, any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and is hereby declared illegal, null and void." The words relied on in that clause by the appellant are these, that any provision made directly or indirectly respecting the manner in which or the person with whom any of the moneys to become due shall be laid out or expended is rendered illegal, null and void. Now the contention on behalf of the appellant is this. That the appellant by a provision in the contract between her and her employers agreed to become a member of the sick and accident club; that although the agreement did not in terms provide that the subscriptions to that club were to be paid out of her wages, yet nevertheless that must have been in the contemplation of the parties, and that therefore the stipulation in the agreement was illegal within the Truck Act and null and void, because it was an agreement as to the mode in which week by week a portion of her wages was to be expended.

My Lords, the question raised by that contention is certainly one of very considerable importance, and also one of very considerable difficulty. Various cases were put at the Bar in which it would be strange to suppose the Legislature had prohibited the agreements suggested; as, for example, if the agreement contained a provision that the person employed should enter into a fidelity insurance contract and keep up that policy so as to make a provision against any default on his or her part towards the employers. Such a provision for the protection of the employers, it was said, would be not in the slightest degree within the mischief against which the Truck Act was directed; it would be a reasonable and proper agreement to come to, and it cannot be supposed that the Legislature intended to prohibit it by the general words which have been used in the 2nd clause of the Truck Act. It was said, that in the provisions in this case nothing was stipulated with regard to payment out of the wages, or that the subscription was to be kept up by payment from the wages. It was merely a general contract that she would in the present case join this sick fund, no doubt implying that she would make the payments which were requisite to secure such membership. My Lords, there is no doubt very great force in that argument; but on the other hand it would be, I think, very dangerous to hold that any contract, whatever its nature, made by a person employed which involved expenditure of money from time to time was not within the clause, merely because it did not provide that the money should be paid out of wages. So to hold would be in some cases undoubtedly to enable the purpose and object of that 2nd clause to be evaded. I find it very difficult indeed to say where the line should be drawn, if a line is to be drawn, between cases such as these, which would be the one class within, and the other without, the scope and intention of the Truck Act. It may be that it is impossible to draw any such line, and that each case must be dealt with upon a consideration of its own circumstances, and a determination whether it is or is not within the 2nd clause.

In the present case it does not seem to me to be necessary to determine this question. For the purpose of my decision I will assume that the case is within the 2nd section of the Truck Act, though I must not be understood as in any way indicating an opinion that it is so. But assuming it to be within the 2nd section of the Truck Act, what is the effect of that section? It makes the provision in question illegal, null and void.

As regards its illegality, of course, if it be within the section, it would render the employer liable to the penalty provided by the Truck Act. But, in addition to that, it is made null and void. Now, it is to be observed that the becoming a member of this sick and accident club is certainly not made illegal or null and void. It is the contract to become so and to pay the

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subscriptions which alone can be said to be made null and void —that is to say, that the employer, it being null and void, could not as against the employé enforce that provision. That, and nothing more than that, seems to me to be the result of the application of the 2nd clause, supposing it to apply to such a case as the present, that the employed might at any time have said, I will not join, or, I will not continue a member of the sick club, and by so saying would not have committed any breach of contract as against the employers, because the contract was null and void. But, supposing in that sense (and that seems to me the only sense in which the section could be operative) the contract to become a member was null and void, the question which has to be considered in the present case is, What is the position of the employed as regards the employers, supposing that, with her assent, the employers have made a payment week by week on her behalf to the treasurer of a society to which she has consented to belong and has belonged during the time she was in their service? My Lords, I can find nothing in the Truck Act under such circumstances to prevent the employer when sued relying on the fact of such payments as a discharge of his obligations towards his employé in respect of such sums of money as he has not personally handed over to her. I will not repeat again the observations I have made about the only set-off or reduction of demand which is prohibited by the Act.

The question, then, is whether, in the present case, it is established that the total wages of the plaintiff have been paid, either by handing them to her in the current coin of the realm or by making on her behalf payments which she has authorized. I cannot doubt that, on the true view of the circumstances of this case, it has been established that the employer has thus discharged himself, and unless there are provisions in the Truck Act which prevent the inferences being drawn which otherwise would be drawn, the conclusion is absolutely irresistible.

My Lords, I find that in the case of *Ex parte Cooper, In re Morris* (1), circumstances which were very similar to the present were considered by the Court of Appeal. In that case deductions were made from the wages when payment was made

(1) 26 Ch. D. 693.

to the person employed, and on the back of the ticket which was given to each workman when he received his wages were printed some terms and regulations, amongst which were regulations as to the payment to the doctor's fund of so much a month according to the wages which he received, and payments to the reading-room fund of "4*d.* per month, payable by all men and boys over sixteen years of age. These payments will be deducted from the wages." That had gone on for a considerable time, and deductions to a substantial amount had been made in that way from the wages for the purpose of being paid to the treasurer of the reading-room fund and to the doctor; but the firm, in fact, had not paid either the doctor or the treasurer of the reading-room fund. Under those circumstances, steps were taken by the persons employed to recover the money which had been so deducted from their wages. Of course, that case differed from the present inasmuch as there remained in the hands of the firm the moneys which they had deducted, and the defence suggested in the present case did not arise, of course, there. The Court so held; but Lord Selborne in delivering judgment said: "It was suggested that certain sums were payable by the workmen under contracts, which were in substance their contracts, to the doctor and for the purposes of the reading-room, and that, by arrangement with the employers, those sums were to be paid out of that part of the wages which had not been paid to the men. If that had been actually done, and a settlement upon that footing had taken place, I am not, as at present advised, prepared to say that such a settlement could have been treated as a nullity by reason of the Truck Act." That is, of course, an expression of opinion on the very point now under consideration, because I can see not the slightest distinction between a payment to the treasurer of that reading-room fund and a payment to the treasurer of this sick and accident club. Cotton L.J. in that case said: "We do not in any way encourage the idea that our decision would apply (I desire to guard myself in this way, and I understand that the Lord Chancellor intended to do so) to any deduction made from the wages and, in fact, applied by the employers by the direction of the workmen, or in pursuance of an arrangement made with them, in discharge of a debt for

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which they were liable." Therefore, my Lords, we have a very distinct expression of opinion by those eminent judges Lord Selborne and the late Cotton L.J. in favour of the view which, in substance, has been taken by the Court below, and which I am prepared to recommend your Lordships to adopt.

For these reasons I move that the judgment appealed from be affirmed, and the appeal dismissed.

LORD WATSON :—

My Lords, in my opinion the stipulation in her contract of employment, that she should become a member of the sick and accident club, when taken by itself, imposed a perfectly lawful condition upon the appellant. I am also of opinion that the course of dealing by which the respondent firm paid her contributions to the club, and deducted the amount at the weekly settlement of her wages, had all along the tacit assent of the appellant; and that the case must be disposed of on the same footing as if each contribution had been advanced by them under express authority from the appellant.

After the exhaustive observations which have been made by my noble and learned friend, I need not recapitulate the sections of 1 & 2 Wm. 4, c. 37, which bear upon the question before us, or criticize their enactments in detail. For the reasons which the Lord Chancellor has assigned, I think that, whilst the case is one of nicety, your Lordships ought to accept the opinions expressed by the Earl of Selborne and Cotton L.J. in *Ex parte Cooper, In re Morris* (1), and to hold that the contributions advanced by the respondent firm, on behalf of the appellant, were substantially equivalent to payments made by them to the appellant herself, in current coin within the meaning of the Act.

I am personally inclined to hold that the inference thus derived from the earlier clauses of the Act is supported by the terms of sect. 24, which (inter alia) enacts, "that nothing herein contained shall extend or be construed to extend to prevent any such employer from advancing to any such artificer any money to be by him contributed to any friendly society or bank for savings duly established according to law." Apart from the

(1) 26 Ch. D. 693.

statute, advancing the artificer's contributions to a friendly society, established according to law, and advancing his contributions to a domestic club having the same objects in view, appear to me to stand in pari casu. If sect. 24 had been expressed in terms which clearly established an exception from preceding clauses, it would, in my opinion, have afforded an argument in favour of the appellant, because such an exception would have indicated the intention of the Legislature that advances of that kind should be within the intendment of the Act and were not to be permitted, unless in the cases specially referred to. But, on consideration, I am of opinion that the clause does not create a proper exception; and that it must be taken as indicating that the previous enactments were not intended to include and prohibit advances identical in principle with those mentioned.

I therefore concur in the judgment proposed by the Lord Chancellor.

LORD MORRIS:—

My Lords, I entirely concur in the judgment which has been so fully expressed by my noble and learned friend the Lord Chancellor; but having a strong opinion on the 2nd section of the Truck Act as affecting the present case, I consider that I am bound to state it. In my opinion the contract in question is not one which is either aimed at or struck by the 2nd section of the Truck Act. If we look at the contract itself as contained in the written document, it is merely to the effect that all employés shall become members of the sick and accident club. There is nothing in the contract so far as the writing is concerned that is at all within the purview of the Truck Act.

But then it is said that we must, upon the facts of the case come to the conclusion that there was some understanding or agreement that a portion of the wages of the employé was to be deducted and paid to this benefit society, and that consequently that contract becomes illegal under sect. 2. I cannot come to the conclusion, as I have said, in the first place that it is a portion of the contract. But, even if it was, it does not appear to me to be a matter aimed at by sect. 2, which was passed entirely, as the preamble of the Act states and as is stated in its title, in order to get rid of the payment of wages by goods. The words are, that "if any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and is hereby declared illegal, null and void." In my opinion the contract in question, even if there was this understanding, certainly does not come within the spirit of the Act; in my opinion it does not come within the letter of the section, as a payment made to the benefit society was not a laying-out or expending of the wages of the artificer within the meaning of sect. 2, but was merely an allocation of part of the wages of the employé at the request of the employé, and therefore in my opinion it does not come within the section.

LORD SHAND:—

My Lords, I confess that it is satisfactory to me that your Lordships have come to the conclusion that this appeal should not be allowed, for I have felt throughout the argument, that whether it might or might not be possible to bring the case within the letter of the provisions of the Truck Act, it was not substantially within the mischief which that Act was intended to remedy, or within the spirit of the statute as striking against the evil which had been in existence at the time when it was passed.

The grounds upon which your Lordships have proceeded, and in which I entirely concur, are materially different from those which are the basis of the judgment of the learned judges of the Court of Appeal. These learned judges have held expressly that the contract in this case was struck at by the provisions of the statute. Upon that question I shall only say that, while I shall not express myself so strongly as my noble and learned friend who has just sat down, I am certainly not satisfied that the contract in this case is one in violation of the provisions of the statute. If one looks at these various provisions, it appears plainly enough that the mischief to be remedied was, as has been already mentioned by my noble and learned friend the Lord

Chancellor, that goods were given instead of or in part payment of wages to the persons employed, and that the employers, besides getting a benefit from the proper work done by their servants, were obtaining a second benefit by the supply of goods in the sale of which they were presumably interested. There was a double benefit to them. You see from the provisions of the statute that the two things which are strongly brought out in many of its various provisions and in the schedules attached to the Act and which it was intended to prohibit are these: payment in goods, and an advantage thereby gained by the employers. In the present case, neither of those elements is present. The contract has nothing to do with goods, and it cannot be suggested—indeed it has not been suggested in the argument—that the employer was to obtain any benefit whatever. But farther than this, I participate in the view expressed by my noble and learned friend beside me (Lord Morris) that it is an important circumstance here that there was no stipulation for the payment to be made out of wages at all. Apart from the acts of the parties, I find nothing in the contract which can be said to be struck at by the statute. I think an employer may fairly say, "I shall not employ or retain a servant in my employment unless he contributes to a sick and benefit fund, and thus makes a provision for a time of illness from accident or otherwise, or it may be death." As an employer he may say that he requires security from certain classes of servants, and will not employ these unless they contribute to one of the fidelity associations, or that he will only employ persons who belong and contribute to some temperance society or something of that kind. There can be no doubt that this contract would have been fully implemented if the appellant, having obtained her wages week after week, had herself gone and contributed, out of the moneys which she had received or other moneys, to the payment of any premium she required to pay; or the payments might have been made for her by other persons altogether. In short, so far as the contract itself is concerned, I do not read into it that it was necessary that the payments should be made out of her wages, or should be deducted from such wages, which is essential to make the statute apply. I certainly feel the difficulty which the Lord

Chancellor has expressed in saying that if there had been a provision that goods should be purchased at a particular store it might perhaps be successfully contended that this would have been struck at by the Act, although it were not expressly stipulated that payment was to be made out of wages. I do not say how that might be; but the element that there is no personal advantage gained, or which must be presumed to be gained by the employer (in a case like this), would weigh very much with me in considering whether upon the construction of such a contract it was struck at by the Act at all.

My Lords, having expressed these views, differing from what has been indicated as the basis of the judgment in the Court below, I entirely agree on the particular ground on which the Lord Chancellor has put the judgment which he has proposed in this case. I mean that there is clear evidence, or at all events evidence sufficient to shew that there was such an authority given by this appellant week by week for the payment of a contribution towards this sick and benefit fund as precludes her from now challenging those payments. The payment was made to the treasurer acting for this association; and I think that a payment made presumably, as and when wages have become due, at the request or on the mandate of one of the persons employed, to meet an obligation or for a purpose which he or she desires to fulfil is a payment which is not invalid as being struck at by the requirements of the statute.

Upon these grounds, my Lords, I concur with your Lordships in thinking that this appeal should be dismissed.

Order appealed from affirmed and appeal dismissed.

Lords' Journals 7th May 1894.

Solicitors for appellant: *Shaen, Roscoe, Massey & Co.*
Solicitor for respondents: *M. Jutsum.*

[HOUSE OF LORDS.]

BRITISH AND AMERICAN TRUSTEE AND FINANCE CORPORATION, LIMITED AND REDUCED . . . . . APPELLANTS;

AND

JOHN COUPER . . . . RESPONDENT.

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1894
April 16

Company—Power of Company to Purchase its own Shares—Reduction of Capital—Extinguishment of Shares—Confirmation by the Court—Companies Acts 1867 (30 *&* 31 *Vict. c.* 131) *ss.* 9, 11, *and* 1877 (40 *&* 41 *Vict. c.* 26) *ss.* 3, 4.

A company limited by shares had power under its articles to reduce its capital by paying off capital. The shares were divided into ordinary shares partly paid up, and founders' shares fully paid up. The company had carried on business both in England and the United States, but it being found impossible to do so in both countries with advantage it was determined that the company should cease to carry on business in the United States, that the American investments should be made over to the American shareholders, their shares being cancelled, and that the English shareholders should take the English assets, receiving an agreed sum by way of adjustment. This arrangement was carried out by special resolution providing that the capital should be reduced by paying off the shares (both ordinary and founders') held by the American shareholders (the capital represented thereby being in excess of the wants of the company), and that such shares and all liability thereon be wholly extinguished. The company presented a petition praying the Court to confirm the resolution. All the creditors were either paid or assented to the arrangement. The confirmation by the Court was opposed by one shareholder:—

Held, reversing the decision of the Court of Appeal, that the reduction of capital was within the powers conferred by the Companies Acts 1867 and 1877, and that the arrangement being a fair and equitable one there was no reason why it should not be confirmed.

Observations on *Hutton* v. *Scarborough Cliff Hotel Company B* (2 Drew & Sm. 521) and the reasoning in *In re Denver Hotel Company* ([1893] 1 Ch. 495).

THE following statement of facts is taken from the judgment of Lord Herschell L.C.

The appellant company was incorporated in 1890 under the Companies Acts, 1862 to 1886, as a company limited by shares, with a registered office in England.

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The capital was £2,000,000, divided into 188,600 ordinary shares of £10 each, and 114,000 general founders' shares of £1 each. The company had issued 63,109 of the shares of £10, on each of which £2 had been paid up, and 72,298 of the general founders' shares, all of which were fully paid up. By the articles of association it was provided that the company might reduce its capital by paying off capital. On the 18th of May 1892 the company presented a petition praying that a special resolution passed and confirmed at extraordinary general meetings of the company might be confirmed by the Court.

The resolution provided for a modification of the conditions of the memorandum of association by a reduction of the capital of the company to £1,691,737, divided into 160,767 ordinary shares of £10 each, and 84,067 general founders' shares of £1 each, and that the remainder of the capital, namely, the 27,833 ordinary shares, numbered as therein mentioned, and the 29,933 general founders' shares, numbered as therein mentioned, be paid off (the capital represented thereby being in excess of the wants of the company), and that such last-mentioned ordinary and general founders' shares respectively and all liability thereon be wholly extinguished.

The company had carried on business in the United States, and a portion of its investments were in that country. These investments had been made on the advice of a committee of the board by the directors resident in America. Differences arose between the board of directors in England and the American committee as to the management of the business of the corporation, which rendered it impossible to carry on such business both in England and the United States with advantage. It was accordingly determined that the best course to be adopted was that the company should cease to carry on business in the United States, and it was arranged that the American investments should be made over to the American shareholders, subject to the payment of £11,000 to the corporation, and that the shares held by the American shareholders should be cancelled, thus reducing pro tanto the capital of the company. This arrangement was approved by the shareholders at two extraordinary general meetings. All the creditors of the company were either paid or assented to the

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arrangement. The interests of the shareholders alone had therefore to be considered. On the hearing of the petition, confirmation by the Court was opposed by one of their number. North J. dismissed the petition with costs, and his decision was affirmed by the Court of Appeal (Lindley, Bowen, and A. L. Smith L.JJ.) (1).

March 15, 19. *Cozens-Hardy* Q.C. and *A. R. Kirby*, for the appellants:—

It has hitherto been held that a reduction by return of capital can only be effected when the amount returned is rateably distributed. Reduction was first authorized by sects. 9, 10, 11 of the Act of 1867, and the power of the Court was enlarged by the Act of 1877. But there is no such restriction in these Acts as is expressed in *In re Denver Hotel Company* (2), where Lindley L.J. said of sect. 3 of the Act of 1877: "But these words cannot in our opinion be construed so as to enable a company to prefer one shareholder to another of the same class as himself by buying up his shares." There are observations in *Trevor* v. *Whitworth* (3) which shew that a reduction effected as is here proposed would be legitimate. See per Lord Macnaghten at p. 438; payment of capital to one shareholder is said to be a reduction of capital within the meaning of the Acts of 1867 and 1877. The transaction is a business one for the benefit of the company, and the creditors are either paid or have assented.

Mark L. Romer, for the respondent:—

It has not been shewn that the capital which it is proposed to pay off is in "excess of the wants of the company" as required by sect. 3 of the Act of 1877. Further, there is no power to alter the rights of the shareholders inter se, and the Court will not sanction a reduction so unfair as the one here proposed. The principle laid down by Jessel M.R. in the case of *Ebbw Vale Company* (4) that it is only nominal capital which can be reduced still holds good. See preamble to the Act of 1877 and sect. 12

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(1) Not reported.

(2) [1893] 1 Ch. 495.

(3) 12 App. Cas. 409.

(4) 4 Ch. D. 827.

of the Act of 1862. It was ultrà vires of the company to pass the resolutions: *Griffith* v. *Paget* (1). There is nothing in the Acts to authorize a reduction effected by such a redistribution as is proposed in the present case. Sect. 3 of the Act of 1877—the operative section—only extends the power of reduction to paid-up capital and the cancellation of lost capital. It was never contemplated that three-fourths of the shareholders should have the power of altering the whole constitution of the company. The memorandum is a contract which can only be altered within the limits rigidly prescribed in the Acts of 1867 and 1877. The object is to write off lost capital—not to enable a majority to override a minority. None of the purposes specified in the Companies (Memorandum of Association) Act 1890 s. 1 sub-s. 5 are attained by the scheme. The principle "de minimis" cannot be applied so as to extinguish even one shareholder. The reduction does not treat the shareholders with equality, and is contrary to the spirit of the Acts: *Hutton* v. *Scarborough Cliff Hotel Company B* (2).

Cozens-Hardy Q.C. in reply cited *In re Direct Spanish Telegraph Company* (3).

The House took time for consideration.

April 16. Lord Herschell L.C. (after stating the facts given above):—

My Lords, the case was, in both Courts, supposed to be governed by the views expressed by the Court of Appeal in the case of the *Denver Hotel Company* (4), that a company could not reduce its capital by paying off some of its shareholders unless all shareholders of the same class were dealt with alike. The merits of the arrangement embodied in the resolution now in question were not entered into. The position assumed was that the Court had no power to confirm it as being ultrà vires. This renders it necessary to consider carefully what are the powers conferred by the Companies Act 1867 and the Amending Act of 1877.

(1) 5 Ch. D. 894.
(2) 2 Drew. & Sm. 521.
(3) 34 Ch. D. 307.
(4) [1893] 1 Ch. 495.

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By the earlier of these statutes, companies were for the first time empowered to reduce their capital. Sect. 9 provides that any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum as to reduce its capital; and by sect. 11 a company which has passed a special resolution for reducing its capital may apply to the Court by petition for an order confirming the reduction, and on the hearing of the petition the Court, if satisfied that every creditor entitled to object to the reduction has either been paid or been secured or consents, may make an order confirming the reduction.

In consequence of views indicated by the late Master of the Rolls, that the Act of 1867 did not sanction the return of unpaid capital, the Act of 1877 was passed. It was enacted by sect. 3 that "capital," as used in the Act of 1867, shall include paid-up capital, and the power to reduce capital conferred by that Act "shall include a power to pay off any capital which may be in excess of the wants of the company." To the terms of sect. 4 I shall have occasion to refer presently.

It will be observed that neither of these statutes prescribes the manner in which the reduction of capital is to be effected. Nor is there any limitation of the power of the Court to confirm the reduction, except that it must first be satisfied that all the creditors entitled to object to the reduction have either consented or been paid or secured.

Now, it can scarcely be denied that such a scheme as that under consideration, by which certain of the shareholders receive a part of the assets of the company equivalent to their shares therein, such shares being then cancelled, is a mode of effecting a reduction of the capital of the company.

When the case of *Trevor* v. *Whitworth* (1) was before this House, my noble and learned friend Lord Macnaghten said (p. 437): "I may say that the Act of 1867, as explained by the Act of 1877, seems to prohibit a company from purchasing its own shares, except under certain stringent conditions. When Parliament sanctions the doing of a thing under certain conditions and with certain restrictions, it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed. Now, the Act of 1862 makes no provision for reduction of capital. The Act of 1867 allows a limited company to reduce its capital under conditions which carefully protect the interests of creditors. The Act of 1877 explains that the power to reduce capital includes a power to 'pay off any capital which may be in excess of the wants of the company,' and it dispenses with some of the prescribed conditions when the reduction does not involve either the diminution of any liability in respect of unpaid capital or 'the payment to any shareholder of any paid-up capital.' It follows that if the operation be effected by payment of capital to any one shareholder all the prescribed conditions must be followed. Payment of capital to any one shareholder is just as much a reduction of capital, and just as detrimental to the interests of creditors, as the payment of the same amount among all the shareholders rateably. It is none the less a payment off of capital within the meaning of the Act of 1867, as explained by the Act of 1877, because the shareholder to whom the payment is made renounces in return the right to participate in the joint stock of the company."

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(1) 12 App. Cas. 409, 437, 415.

I did not express myself so definitely on the point, but I said: "Experience appears to have shewn that circumstances might occur in which a reduction of the capital would be expedient. Accordingly by the Act of 1867, provision was made enabling a company under strictly defined conditions to reduce its capital. Nothing can be stronger than these carefully worded provisions to shew how inconsistent with the very constitution of a joint stock company, with limited liability, the right to reduce its capital was considered to be." And further on I said: "And the stringent precautions to prevent the reduction of the capital of a limited company, without due notice and judicial sanction. would be idle if the company might purchase its own shares wholesale, and so effect the desired result."

There can be no doubt that the ratio decidendi in that case was in part, at least, this: that a company which paid away its assets for the purchase of its own shares did thereby reduce its capital, and that not in a manner authorized by the Legislature.

If, then, the scheme which the Court is asked to confirm be in fact one for reduction of capital, I am, with all deference, at a loss to understand how the Court in confirming it could be acting ultrà vires, seeing that, as I have pointed out, the statute has not prescribed the manner in which the reduction is to be carried out, nor has it prohibited any method of effecting that object. Indeed, the provisions of sect. 4 of the Act of 1877 recognize that a scheme may involve the payment to a shareholder of a part of the paid-up capital, for it enacts that where the reduction of capital by the company does not involve either the diminution of liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital, the creditors of the company, unless otherwise directed by the Court, shall not be entitled to object or required to consent to the reduction.

In the case of the *Denver Hotel Company* (1) Lindley L.J., in delivering the judgment of the Court, said: "If this transaction really was a purchase by the company of its own shares from one shareholder only, we are of opinion that the Court could not sanction it. The purchase by the company involves the possession by the company of sufficient assets to pay for the shares bought, and the capital represented by such shares would not be lost nor unrepresented by available assets. The capital might be in excess of the wants of the company within the words of sect. 3 of the Companies Act 1877. But these words cannot, in our opinion, be construed so as to enable a company to prefer one shareholder to another of the same class as himself by buying up his shares, and we cannot regard Lord Macnaghten's judgment in *Trevor* v. *Whitworth* (2) as intimating that any such transaction is within the statute. His remarks were made to enforce his view that, apart from the Companies Acts, 1867 and 1877, it is ultrà vires of a limited company to buy its own shares, even if its memorandum and articles expressly authorize it to do so. But he was not contemplating preferring one shareholder to another of the same class as himself."

My Lords, if all the shareholders of a company were of opinion that its capital should be reduced, and that this reduction

(1) [1893] 1 Ch. 495.

(2) 12 App. Cas. 409.

would best be effected by paying off one shareholder and cancelling the shares held by him, I cannot see anything in the Acts of 1867 and 1877 which would render it incumbent on the Court to refuse to confirm such a resolution, or which shews that it would be ultrà vires to do so.

I do not see any danger in the conclusion that the Court has power to confirm such a scheme as that now in question, or any reason to doubt that this was the intention of the Legislature. The interests of creditors are not involved, and I think it was the policy of the Legislature to entrust the prescribed majority of the shareholders with the decision whether there should be a reduction of capital, and if so, how it should be carried into effect. The interests of the dissenting minority of the shareholders (if there be such) are properly safeguarded by this: that the decision of the majority can only prevail if it be confirmed by the Court. This is a complete answer to the argument, ably urged by Mr. Romer at the Bar, that if all the shareholders of the same class were not dealt with in precisely the same fashion, the interests of the minority might be unjustly sacrificed to those of the majority.

There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar, would be most narrowly scrutinised by the Court, and that no such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or inequitably. But this is quite a different thing from saying that the Court has no power to sanction it.

It was further argued that the scheme was not within the statutory powers of the company, inasmuch as these were confined to paying off "any capital which may be in excess of the wants of the company." I may observe that sect. 3 of the Act of 1877 which contains these words, only enacts that the power to reduce capital conferred by the Act of 1867 "shall include" that power. But even if this is to be regarded (which I am far from saying that it is) as a limitation of the power to reduce capital by paying off paid-up capital, I am of opinion that in view of the alterations intended in the method of carrying on the business of this corporation the case is one in which the reduction has been effected, because the capital is in excess of the requirements of the company.

Assuming that it is within the power of the Court to confirm such a scheme as the present, it was scarcely contended by the learned counsel who represented the respondent that there was any ground for refusing to do so, or that it involved any result either unjust or inequitable; and indeed, in view of the evidence before the Court, it would not have been possible successfully to maintain such a contention.

For these reasons I am of opinion that the judgment appealed from should be reversed, and that the special resolution should be confirmed, and I move your Lordships accordingly. Having regard to the fact that the term "reduced" has been used in describing the company for a very considerable time, I think that they may be allowed hereafter to discontinue that addition.

Lord Watson:—

My Lords, the appellants, who are a company limited by shares, ask the Court to confirm a special resolution for the reduction of their capital, which has been passed by a statutory majority of the members. The scheme submitted for confirmation involves the application of part of the available assets of the company to the purchase and extinction of a certain proportion both of general founders' shares and ordinary shares, those being the two classes into which their nominal capital is divided. If the scheme were carried out their reduced capital would consist of the shares now held by those members whose interests are not to be purchased and extinguished.

The company have practically no outside creditors; but their petition is opposed by the respondent, who owns shares of both classes. At the Bar of the House he did not maintain that under the scheme sought to be confirmed the shareholders of either class, whether they were bought out or continued to be members, would not each of them receive a fair and reasonable equivalent for his present interest in the company, and nothing more. He relied solely upon the plea that it is beyond the statutory jurisdiction of the Courts to sanction any scheme for the reduction of capital which does not deal in precisely the same way with each and every share belonging to the same class. If that be the law, it is manifest that in some cases the result might be unfortunate. Apart from the interest of creditors, the question whether each member shall have his share proportionately reduced, or whether some members shall retain their shares unreduced, the shares of others being extinguished upon their receiving a just equivalent, is a purely domestic matter; and it might be greatly for the advantage of the company that the latter alternative should be adopted. Although every member of the company were agreed as to the desirability of taking that course, if the plea of the respondent be well founded the Court would have no power to assist them.

North J. dismissed the petition, and his decision was affirmed by the Appeal Court. There is no record before us of what was said by the learned judges; but it appears that the case was admitted by counsel to be within the rule expressed by Lindley L.J. in *In re Denver Hotel Company* (1), and that the rule was followed as a precedent binding upon them, and without discussion by the Appeal Court. In that case the scheme before the Court for its approval embraced a transaction for the sale of one of the company's assets to a shareholder. The sale was to be in consideration of a sum of £3000, and as Lindley L.J. states (p. 504), "in further consideration of his surrendering his shares to the company." North J., who had refused confirmation, held that the transaction amounted in substance to the repayment of capital to part of a class of shareholders, without the assent of one-seventh of the whole, and in those circumstances his Lordship was of opinion that he had no power to give effect to the arrangement—although he considered it to be a beneficial one—and would have been prepared to sanction it if he had the power to do so. The Appeal Court reversed his judgment and confirmed the resolution. They held that the transaction was not a purchase, but a surrender of shares which could have been effected by the company without the sanction of the Court. Lindley L.J. said (p. 505), "If this transaction really was a purchase by the company of its own shares from one shareholder only, we are of opinion that the Court

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could not sanction it. The purchase by the company involves the possesssion by the company of sufficient assets to pay for the shares bought, and the capital represented by such shares would not be lost nor unrepresented by available assets. The capital might be in excess of the wants of the company, within the words of sect. 3 of the Companies Act 1877. But these words cannot in our opinion be construed so as to enable a company to prefer one shareholder to another of the same class as himself by buying up his shares, and we cannot regard Lord Macnaghten's judgment in *Trevor* v. *Whitworth* (1) as intimating that any such transaction is within the statute."

I agree with the Lords Justices in thinking that the observations made in *Trevor* v. *Whitworth* (1) by my noble and learned friend Lord Macnaghten were not intended to have, and have not, any direct bearing upon the construction of the powers committed to the Court, with respect to reduction of capital by the Act of 1867 and subsequent statutes. They were directed to the point that the purchase of its own shares by a company, although made on terms advantageous, is in effect a reduction of its paid-up capital, and is therefore ultrà vires of the company. For the purposes of this appeal the decision of the House in *Trevor* v. *Whitworth* (1) does not appear to me to go farther than to affirm that the purchase of its shares by a company is one of the methods by which a reduction of its capital can be effected. It does not establish that reduction by that method is more deeply tainted with illegality than any other means by which the same result is attainable. To my mind the only substantial question arising in this appeal is whether these empowering statutes give jurisdiction to entertain proposals for reduction of capital in any manner whatever of which the Courts may approve, or whether their jurisdiction is excluded in the case of proposals to reduce it by the purchase of shares.

Sect. 9 of the Act of 1867 contains the leading enactments upon this subject. It enables a company limited by shares so far to modify the conditions in its memorandum of association as to reduce its capital, if authorized to do so by its regulations as originally framed or as altered by special resolution. Sect. 11

(1) 12 App. Cas. 409.

provides that a company which has passed a special resolution to that effect may apply to the Court for its confirmation. Specific directions are given for the guidance of the Court with the view of protecting the interests of creditors of the petitioning company; but in so far as concerns the interests of its members, I do not find a single expression in the Act tending to indicate that the discretion of the Court to grant or refuse such an application does not extend to every possible mode of reducing capital. The decision of the Appeal Court in *In re Denver Hotel Company* (1) proceeds upon the view that reduction by purchase of shares is not covered by the words of sect. 3 of the Act of 1877. Assuming that view to be correct, the clause does not, in my opinion, derogate from the rights already given to companies, subject to the approval of the Court, by the Act of 1867. It does not profess to give a complete definition of these rights; it simply explains, and possibly extends, in some particulars, the provisions of the previous statute. The next clause (sect. 4) contains a proviso which appears to me to support the inference that capital may be legitimately reduced by buying out some of the members of the company. It dispenses with certain conditions required by the Act of 1867, except in cases where the reduction of capital involves "either the diminution of any liability in respect of unpaid capital, or the payment to any shareholder of any paid-up capital." These last words appear to contemplate that repayment of paid-up capital may be made either to all or to one or more of the body of shareholders.

For these considerations I cannot, notwithstanding the able argument of Mr. Romer for the respondent, resist the conviction that the Courts below were bound to entertain the present case, and to dispose of it upon its merits. I see no reason to doubt that the Court of Appeal arrived at a just conclusion in *In re Denver Hotel Company* (1), although I am by no means satisfied that the surrender made in that case was one which the company could lawfully accept without the sanction of the Court. In *Trevor* v. *Whitworth* (2), Lord Macnaghten said (p. 438): "I conceive that there can be no objection to the surrender of shares which are liable to forfeiture. A surrender of shares in return for money paid by the company is a sale, and open to the same objections as a sale, whatever expression may be used to describe or disguise the transaction." I concur in that opinion; and I do not think the transaction ceases to be a sale in substance, when the surrender of his share forms, not the whole, but part only, of the consideration given by a shareholder in exchange for an asset of the company.

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(1) [1893] 1 Ch. 495.

(2) 12 App. Cas. 409.

Seeing that the respondent has not argued that any injustice would follow to himself or any other member of the company, I concur in the judgment moved by the Lord Chancellor.

Lord Macnaghten :—

My Lords, I agree.

Under the Companies Act 1862 it was not competent for a company limited by shares to reduce its capital. Such an operation would have been in contravention of one or more of the statutory conditions of the memorandum which the Act as it then stood made unalterable. The difficulty, however, was removed shortly afterwards by legislation. The Companies Act 1867 declares that any company limited by shares may by special resolution so far modify the conditions contained in its memorandum, if authorized so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital. The power is general. The exercise of the power is fenced round by safeguards which are calculated to protect the interests of creditors, the interests of shareholders, and the interests of the public. Creditors are protected by express provisions. Their consent must be procured or their claims must be satisfied. The public, the shareholders, and every class of shareholders individually and collectively, are protected by the necessary publicity of the proceedings and by the discretion which is entrusted to the Court. Until confirmed by the Court the proposed reduction is not to take effect, though all the creditors have been satisfied. When it is confirmed the memorandum is to be altered in the prescribed manner, and the company as it were makes a new departure. With these safeguards, which certainly are not inconsiderable, the Act apparently leaves the company to determine the extent, the mode, and the incidence of the reduction, and the application or disposition of any capital moneys which the proposed reduction may set free.

The Companies Act 1877 was passed mainly in order to remove certain doubts created by the decision of Sir George Jessel in the *Ebbw Vale Case* (1), which was a surprise to the profession at the time, and which is, I believe, generally thought to have been incorrect. At any rate, the Act of 1877 gives no support or countenance to the construction which Sir George Jessel adopted. In fact, it destroys the foundation of the learned judge's argument. While it dispenses with the intervention of the Court in the case of reduction of capital by the cancellation of shares not taken or agreed to be taken by any person, it yet reserves to the Court the power of requiring the consent of creditors in the case of reduction by cancellation of lost capital —the very case in which Sir George Jessel thought such a requirement so unreasonable that he felt constrained to hold that the case itself was not within the Act. The Companies Act 1877 declares that certain cases to which, in Sir George Jessel's opinion, the Act of 1867 did not apply, shall be included in the power conferred by that Act. It introduces some valuable amendments, and it is useful in throwing light upon the scope of the earlier Act. It is clear, for instance, from sect. 4 that the Court must look at the arrangement as a whole, and have regard to all the circumstances of the case, and the consequences which, to use the language of the Act, the reduction "involves." Then it is clear from the following part of the section that in the opinion of the Legislature reduction of capital is a matter which concerns or may concern the public. The Court must take everything into account before confirming the reduction. But there is not a word in the Act of 1877, from beginning to end, tending to narrow the scope of the Act of 1867. The generality of the power conferred by that Act is left wholly untouched.

Turning to the facts of the case under appeal, your Lordships have before you an English company limited by shares, and formed for the purpose of engaging in financial undertakings of every sort and description in every part of the globe. Its main

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(1) 4 Ch. D. 827.

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purpose, however, was to make investments in English and American securities; and its operations so far have been confined to that field. The English business is under the control of the board of directors in London. The American business has been managed by some of the directors who are resident in America acting as a committee, under the supervision of the London board. For some time past there has been friction between the London board and the American committee. The board were cautious and old-fashioned. The committee advocated a bolder policy, and demanded a freer hand. Matters were approaching a deadlock; at last, after much negotiation, both sides arrived at the conclusion that a separation of interests was desirable. It was seen that, in the state of the market, winding-up would be disastrous to all concerned; so it was proposed that the American shareholders, who were content to follow the American committee, should take over the American assets, and sever their connection with the company, and that the English shareholders should take the English assets, receiving an agreed sum by way of adjustment. The proposed arrangement has been approved by special resolution at general meetings, in which the American shareholders apparently took no part. The application to the Court was for an order confirming a reduction of capital to meet the arrangement. It is for the company, and for the company alone, to judge of the prudence of the course proposed. The objects of the company are wide enough to employ or exhaust the wealth of Lombard Street or the City of London. But, again, it is for the company to determine, subject, of course, to the statutory provisions for the protection of creditors, whether its capital under the circumstances, and in view of the policy approved by the shareholders, is or is not in excess of its present wants. It is not suggested by the one shareholder who stands alone in opposing the application that the majority are acting oppressively, or that the arrangement is unfair or inequitable in the ordinary sense of those words. His real objection rather seems to be that he prefers the American system of doing business, and that he has more confidence in the American committee than in the London board.

Why should the proposed arrangement not be carried into effect? The House has not the advantage of any judgment on the question, either in the Court of first instance or in the Court of Appeal. It seems to have been conceded in both Courts that the case was governed by the judgment of the Court of Appeal in *In re Denver Hotel Company* (1). The actual decision in that case does not touch the question, although there are some observations of the learned Lord Justice, who delivered the judgment of the Court, which, if accepted, would conclude the matter. Speaking for myself, I cannot see any substantial distinction between the *Denver Hotel Case* (1), where the reduction was confirmed, and the present case, where it is admitted that, if the view of the Court of Appeal in the *Denver Hotel Case* (1) be correct, confirmation must be refused. In both cases, as it seems to me, you have a purchase by a limited company of its own shares; for I cannot agree that a transaction which involves a surrender of shares as part of the consideration is anything but a purchase of shares within the meaning of the opinion of this House in *Trevor* v. *Whitworth* (2).

Undoubtedly, as Lindley L.J. observes, "the cases upon reduction of capital are not in a satisfactory state." There are authorities in which it seems to be laid down that a proposed reduction of capital cannot be confirmed if it involves a purchase by the company of its own shares, and for that reason alone. That of itself, however, cannot be a sufficient objection. The shares are not to be purchased out of the company's capital, but out of moneys withdrawn from the capital and set free by the reduction. A company cannot employ any part of the capital with which it is registered, so long as it forms part of its capital, in the purchase of its own shares. But if it proposes to reduce its capital in accordance with the statutory provisions which empower it to do so, there is no reason why it should not employ the fund set free by the reduction in the purchase of shares which it is intended to extinguish. Nothing can be more contrary to the principle of the Companies Acts than the return of capital by a company limited by shares. But if capital money is set free by reduction of capital, no one ever

(1) [1893] 1 Ch. 495.

(2) 12 App. Cas. 409.

suggested that it could not be returned to the shareholders, and indeed the Act of 1877 declares that such an operation is included in the power conferred by the Act of 1867. The fact that a thing is prohibited if it is done in the wrong way, and at a time when the circumstances of the case do not justify it, is no reason for holding the thing prohibited if it is to be done in the right way and when it is justified by circumstances.

Mr. Romer, who argued the case very well, did not press this point as constituting in itself a sufficient answer to the application. The reduction he said was not objectionable simply because it involved a purchase by the company of its own shares, but because a purchase by a company limited by shares of some of its own shares must involve dealing with shareholders, members of one and the same class, in different ways. You cannot, he said, reduce or extinguish some of a class of shares without equally reducing or extinguishing all the others of the same class. That was the objection which in the opinion of the Court of Appeal would have been fatal to the application of the Denver Hotel Company if the Court had regarded the transaction as really a purchase of shares. The words of sect. 3 of the Act of 1877 "cannot in our opinion," says Lindley L.J. "be construed so as to enable a company to prefer one shareholder to another of the same class as himself by buying up his shares." With all deference I venture to think that mode of stating the proposition is really begging the question. It assumes that the person whose shares are to be purchased is getting a preference—an undue advantage for himself at the expense of his fellow shareholders. But why should that assumption be made? The person whose shares are bought gets money or money's worth. The persons on whose behalf the company buys have their own shares improved by the value of the shares extinguished. If the parties to the transaction come to the conclusion that the bargain is a fair one, why should the Court say that there is a preference on the one side or on the other? If there is nothing unfair or inequitable in the transaction, I cannot see that there is any objection to allowing a company limited by shares to extinguish some of its shares without dealing in the same manner with all other shares of the

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same class. There may be no real inequality in the treatment of a class of shareholders although they are not all paid in the same coin or in coin of the same denomination.

It is not easy to ascertain the origin of the objection urged on behalf of the respondent, though it has been put forward not unfrequently. It seems to have grown out of the decision in the case of *Hutton* v. *Scarborough Cliff Hotel Company B* (1) on which Mr. Romer relied. In that case the company's memorandum of association declared that the capital was divided into a certain number of shares. There was nothing in the memorandum or in the articles to indicate that the shares might be of different classes. The directors found that they could not issue the whole as ordinary shares. A special resolution was passed authorizing the directors to issue a certain number as preference shares. The proposed issue was restrained, at the suit of an ordinary shareholder, on the ground mainly that, although the company had passed a special resolution authorizing the issue of preference shares, they had not in terms altered one of the original articles which provided for equality among shareholders in respect of dividends. The company then passed a special resolution altering the obnoxious article. They were again met by an application for an injunction, and the injunction was granted by Kindersley V.-C. on the ground that there was an implied stipulation in the memorandum of association that all the shareholders should stand on an equal footing as to the receipt of dividends, and that what was proposed to be done was "contrary to the very nature of a joint stock company," and was "an alteration in the constitution of the company."

It is difficult to understand what the learned Vice-Chancellor meant by the expression, "constitution of the company," and it is difficult to deal with an argument resting on a phrase so vague. Nor is it easy to understand the Vice-Chancellor's view, that equality among shareholders in respect of dividends was an "implied stipulation in the memorandum." There is nothing in the Act of 1862, or in any other Act, requiring the memorandum to contain any reference to the rights of shareholders inter se. The division of the capital into shares of a certain fixed amount

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(1) 2 Drew. & Sm. 521.

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which must appear in the memorandum would not be altered or affected by issuing some of the shares as preference shares. The practical result of the decision has been that, except in cases coming within the rule laid down in *Harrison* v. *Mexican Railway Company* (1)—a decision which has not met with universal acceptance—no company limited by shares that has not taken power by its memorandum to issue preference shares has been able to raise additional capital in the manner most advantageous to its shareholders and its creditors. It seems to me that the decision in *Hutton* v. *Scarborough Cliff Hotel Company B* (2) was not founded upon a sound view of the Companies Act 1862, and I respectfully dissent from it. I have the less hesitation in expressing this opinion, because I find that Cotton L.J. has disapproved of the chief ground on which the decision was based. "In reality," he says, in *Guinness* v. *Land Corporation of Ireland* (3), "it is not by implication from the construction of the memorandum that the equality of the shareholders as regards dividends arises, but by the implication which the law raises as between partners, unless their contract has provided the contrary." Lindley L.J. in a later case takes the same view. I agree that the equality of shareholders as regards dividends is not an implied condition of the memorandum. But I doubt whether it is necessary to have recourse to the doctrines of partnership. It seems to me that if the sum of the interests of persons concerned in a joint adventure is divided into shares of equal amount distinguished by numbers for the purpose of identification, but with no other distinction between them, express or implied, it follows as a self-evident proposition that the interests of the shareholders in respect of their shares as regards dividend and everything else must be equal.

In the result, therefore, I am of opinion that the objection on the part of the respondent is not well founded. I think the proposed reduction is within the powers conferred by the Act of 1867. "There is nothing in the Act," as North J. has observed in the case of *The Barrow Hæmatite Steel Company* (4), "which requires that the reduction should be spread either equally or rateably over all the shares in the company." There is nothing, in my opinion, unfair or inequitable in the arrangement involved in the proposed reduction, and I see no reason why it should not be confirmed.

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(1) Law Rep. 19 Eq. 358.
(2) 2 Drew. & Sm. 521.
(3) 22 Ch. D. 349, at p. 377.
(4) 39 Ch. D. 582, at p. 594.

LORD MORRIS :—

My Lords, I concur in the judgment which has been proposed.

LORD HERSCHELL, L.C. :—

My Lords, I understand that the parties agreed that there should be no costs on either side, and that arrangement is, I think, under the circumstances, reasonable.

Order appealed from reversed, and the special resolution confirmed; the appellant company to be allowed hereafter to discontinue the use of the word "Reduced;" Cause remitted to the Chancery Division.

Lords' Journals 16th April 1894.

Solicitors for appellants: *Ashurst, Morris, Crisp, & Co.*

Solicitors for respondent: *Linklaters, Hackwood, Addison, & Brown.*

[HOUSE OF LORDS.]

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June 4.

COBB . . . . APPELLANT;

AND

THE GREAT WESTERN RAILWAY COMPANY . . . . RESPONDENTS.

Railway Company—Negligence—Robbery of Passenger—Refusal to Detain Train—Overcrowding of Carriage—Damages, Remoteness of.

A statement of claim alleged in substance that the plaintiff, while a passenger in a train of the defendant company, which was then stopping at a railway station, was robbed by a gang of men who entered the carriage where he was then seated; that the plaintiff forthwith complained of the robbery to the station-master, but he refused to detain the train to permit the plaintiff to give the men into custody and have them searched, and immediately upon the plaintiff's complaint being made to him gave the signal for the train to leave, and it started, whereby the plaintiff was prevented from having the men searched and his property recovered; that there was in and about the station, as the station-master well knew, a large force of police ready and willing to effect the arrest for the plaintiff and to search those arrested, but they were prevented from doing so by the action of the station-master in starting the train; that the plaintiff's money was still in the carriage when the plaintiff made his complaint, and might and would then have been recovered had the station-master afforded time for the necessary search. Also that the defendant company was negligent in permitting the carriage to be overcrowded and so facilitating the hustling and robbing of the plaintiff. The plaintiff claimed as damages the amount of money of which he had been robbed:—

Held, affirming the decision of the Court of Appeal ([1893] 1 Q. B. 459), that the statement of claim disclosed no breach of duty on the part of the defendant company, and no cause of action.

Observations on *Pounder* v. *North Eastern Railway Company* ([1892] 1 Q. B. 385).

APPEAL from an order of the Court of Appeal (1).

The statement of claim alleged as follows: On the 6th of May 1892 the plaintiff was received by the defendant company as a passenger to be carried on defendant company's railway by the 8.15 P.M. passenger train from Shrewsbury to Birmingham, for reward to the defendant company then paid by the plaintiff.

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(1) [1893] 1 Q. B. 459.

The train in the course of its journey stopped at Wellington, and the plaintiff was there, while in the defendant company's railway carriage on the journey aforesaid, robbed by a gang of men who there entered the carriage, of the sum of £89 1*s.*, consisting of gold and silver and notes, which the plaintiff was then carrying in his hip pocket. The gang of men numbered about sixteen. The plaintiff forthwith complained of having been robbed as aforesaid to the defendant company's station-master; but the station-master refused to detain the train to permit the plaintiff to give the men into custody and have them searched.

It is the duty of the station-master as the defendant company's servant to give the signal for the train to be started, and immediately upon plaintiff's complaint being made to him he negligently and improperly and in breach of the duty owed by the defendant company to the plaintiff (as a passenger on their line), to protect him in person and property and to oppose no obstacle to his recovering the property whereof he had while on their line been wrongfully deprived, gave the signal for the train to leave, and it left accordingly, and the plaintiff was thereby prevented (without any negligence on his part) from having the men searched and his aforesaid property recovered. There was in and about the station at the time of the robbery, as the station-master well knew, a large force of police ready and willing to effect the arrest for the plaintiff and to search those arrested, but they were prevented from doing so by the action of the defendant company's servant in immediately starting the train. The £89 1*s.* was still in the aforesaid compartment of the carriage at the time when the plaintiff complained to the station-master, and might and would then have been recovered had he afforded time for the necessary search.

The defendant company was negligent in permitting the carriage to be overcrowded and so facilitating the hustling and robbing of the plaintiff. The compartment of the carriage plaintiff was in was constructed to carry ten passengers, and the defendant company caused or permitted the gang of sixteen men to enter it after plaintiff was already seated in the compartment.

The plaintiff has since prosecuted to conviction two of the aforesaid gang of sixteen men who robbed him (being all that have been as yet identified). The plaintiff has by reason of the aforesaid negligence of the defendant company wholly lost the said £89 1*s*.

The plaintiff claims £89 1*s*. as damages for the matters hereinbefore complained of.

The defendants objected that the statement of claim disclosed no cause of action, and this point of law was ordered to be disposed of before the trial of the action. The Divisional Court entered judgment for the defendants and the Court of Appeal dismissed the plaintiff's appeal (1).

May 1. *R. W. Harper* for the appellant:—

It was the company's duty to detain the train in the interests of justice. It is incumbent upon everybody to assist in the apprehension of criminals, and as the plaintiff believed that the stolen property was actually in the carriage on the persons of some of his fellow-passengers, the railway officials ought to have brought in the police and instituted a search. The plaintiff was willing to charge the whole sixteen. Smith L.J. referred to his own decision in *Pounder* v. *North Eastern Railway Company* (2). That case was wrongly decided, and is inconsistent with *Austin* v. *Great Western Railway Company* (3), where Blackburn J. cited *Marshall* v. *York, Newcastle and Berwick Railway Company* (4) for the proposition "that the right which a passenger by railway has to be carried safely does not depend upon his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely." In *New Orleans, St. Louis and Chicago Railway Company* v. *Burke* (5) it was held to be the duty of a railway company to preserve order on its trains and that the company was liable for a failure to discharge this duty.

With regard to the second head of negligence, it is not necessary to shew that the overcrowding was the only cause of

(1) [1893] 1 Q. B. 459.

(2) [1892] 1 Q. B. 385.

(3) Law Rep. 2 Q. B. 442, 445.

(4) 21 L. J. (C.P.) 34; 11 C. B. 655.

(5) 24 Amer. Rep. 689.

the injury. It is the duty of the company to prevent overcrowding, and it is liable for any damage of which such overcrowding is a material or contributory cause.

C. A. Cripps Q.C. and *Lyttelton* for the respondents:—

There has been no breach of any obligation which is thrown on a railway company. The vagueness of the plaintiff's claim is commented on by Bowen L.J. in his judgment. *Pounder's Case* (1) was very different, and this by no means depends upon it. No authority is shewn for such a claim, and during the long period of the existence of railways no such cause of action has ever been brought before the Courts. The appellant asks for detection, not protection. An exceptional state of things has arisen for which the railway company can only be made liable if they have expressly accepted the liability: Mayne on Damages, p. 27. The statement of claim does not allege that the plaintiff was prepared to charge the whole gang and to take the responsibility on himself. The damages are much too remote. The robbery was neither a material nor probable result of overcrowding.

Harper replied.

The House took time for consideration.

June 4. EARL OF SELBORNE:—

My Lords, the plaintiff, appellant here, claims damages from the Great Western Company for the loss of £89 1*s*., which was stolen from his person while travelling in one of their trains in May 1892 by all or some of a body (described in his pleading as a gang) of about sixteen persons, whom the company (as he alleges) "caused or permitted to enter" a compartment of one of their carriages in which he was seated, constructed to carry ten passengers. His claim is founded on a charge of negligence against the company on two grounds, the first being, that he complained of the robbery to the company's station-master at Wellington, in Shropshire, where the train stopped and where

(1) [1892] 1 Q. B. 385.

the robbery was committed, and that the station-master "refused to detain the train to permit him to give the said men into custody and have them searched"; and immediately after the complaint gave the usual signal, on which the train left; "and the plaintiff was thereby prevented (without any negligence on his part) from having the said men searched, and his property recovered." He avers "that there was in and about the said station at the time of the robbery, as the station-master well knew, a large force of police ready and willing to effect the said arrest for him and search those arrested," but that they were prevented from doing so by the station-master's action in starting the train; that the money stolen was "still in the aforesaid compartment of the carriage" when he made his complaint; and that it might and would have been recovered if the station-master had afforded time for the necessary search. The other ground was that the company was "negligent in permitting the said carriage to be overcrowded, and so facilitating the hustling and robbing of the plaintiff."

The question whether any case of actionable negligence was shewn against the company upon the plaintiff's statement of claim was argued on the 16th of January 1893 before a Divisional Court consisting of two judges (Day and Collins JJ.), who held that no cause of action was shewn and ordered judgment to be entered for the defendants. On the 6th of February 1893 that judgment was unanimously affirmed by the Master of the Rolls, Bowen and A. L. Smith L.JJ. in the Court of Appeal. Two of the five learned judges who so agreed (Collins J. and Smith L.J.) referred to a recent decision of *Pounder* v. *North Eastern Railway Company* (1) by Smith L.J. when a judge of the Queen's Bench Division and Mathew J. How far they may have considered it an authority to govern the case before them, I cannot say; but for my own part, if I thought it necessary in the present case to consider the correctness of that decision, I doubt whether I should be prepared to follow it. The facts, as I understand them, were that the servants of the North Eastern Company, having distinct notice that the plaintiff was on reasonable grounds apprehensive that an assault would be committed on him by certain other passengers by the same train if he were compelled to travel in the same carriage with them without protection, he was nevertheless compelled so to travel and was left unprotected, with the result that the apprehended assault was committed. I am unable at present to see a distinction, satisfactory to my own mind, between such a case and that which the Master of the Rolls justly distinguished from the present, when he said that (in this case) it "was not alleged that the plaintiff was being ill-used or assaulted in the train, and that, the fact being made known to the defendants' servants, they did not interfere to prevent it." The present case is quite different: the plaintiff's complaint was made, not before, but after he had been robbed. It is not alleged that there was any failure to "protect him in person and property" down to the time he made that complaint unless the mere fact of "permitting the carriage to be overcrowded" was such a failure. As to this I do not think it necessary to say more than that, on the plaintiff's pleading, it is not shewn that the overcrowding of the carriage did in fact conduce in any way, directly or indirectly, to the robbery; and on the assumption that, under some possible circumstances, this might have been actionable negligence, it would, in my judgment, be indispensable, for that purpose, to state and prove some actual connection between the overcrowding and the loss. It is not, in my opinion, enough to suggest (as the plaintiff does) that to suffer such overcrowding was to "facilitate the hustling and robbing of the plaintiff." As the case is stated by him, nothing turns upon the fact that the robbery was committed by a "gang" of more than nine persons.

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(1) [1892] 1 Q. B. 385.

The substantial question therefore is whether it was, as contended by the plaintiff in his pleading, "a breach of the duty owed by the company to the plaintiff as a passenger on their line" to start the train at the time appointed for that purpose without waiting till the plaintiff could give the men whom he charged with robbery into custody and have them searched. None, I should think, of your Lordships will hesitate to say that it would be right for any station-master, in such circumstances as those alleged, to do whatever he reasonably can for the purposes of justice, when informed that a robbery or any other crime has been committed in one of the company's carriages; and a contrary course of conduct would be highly censurable if no reasonable explanation of it could be given. In the present case your Lordships cannot tell what the facts really were or what explanation of them might be given; you must take them for the purpose of your decision as they are stated by the plaintiff. I will not criticise minutely his form of statement, which certainly does not exclude the supposition that the station-master may have had reasonable ground for thinking that the immediate starting of the train was necessary or important. But taking it in the manner most favourable to the plaintiff, I cannot myself hold that starting the train in the ordinary course was "opposing an obstacle to the recovery of the plaintiff's property" of such a kind as to make the company responsible in the same way as if their negligence had caused or contributed to the robbery. If it was a duty to give opportunity for the arrest and search of the persons charged with the crime, that was, in my opinion, not a duty of the company to the plaintiff as a passenger on their line, but a duty to public justice, for failure in which, by one of their station-masters or any other person in their employment, the company are not liable in an action for damages.

My conclusion is, that the order appealed from is right and that the appeal ought to be dismissed with costs, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, I have had no difficulty in coming to the conclusion that the appellant's statement of claim does not disclose any cause of action against the respondent company, and I fully concur in the reasons which have been assigned for that conclusion by the noble and learned Earl on the Woolsack. I do not express any opinion with respect to the judgment of the Divisional Court in *Pounder* v. *North Eastern Railway Company* (1). That was a case of overcrowding during transit known to the company's officials—a circumstance which does not occur here; and the effect of overcrowding was not the only or the main question at issue. The decision of the case necessarily involved the further, and to my mind much more delicate question, whether any and if so what duty a railway company owes to a passenger who is so obnoxious to other persons using the railway that he runs the obvious risk of being assaulted by them. I prefer to reserve my opinion upon a case of that kind until it arises for decision.

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(1) [1892] 1 Q. B. 385.

Lord Macnaghten:—

My Lords, I also agree in the judgment proposed; but, with my noble and learned friend who has just spoken (Lord Watson), I should prefer to reserve my opinion upon *Pounder's Case* (1) until the question comes before the House for consideration in a case directly raising it.

Lord Morris:—

My Lords, I agree in the judgment moved. I consider it is not the duty of, nor is there any legal obligation upon, a railway company to stop and detain a train for the purpose of a passenger being enabled to give another passenger or any other person into custody. No authority for such a proposition has been cited, and I believe none exists. Under certain circumstances the railway company by their servants ought to do so, and might be morally censurable for not doing so; but that is a very different question from the company being legally bound to do so, and being liable to an action for not doing so.

As to the question of overcrowding, there is no allegation of facts connecting the robbery with the overcrowding and making the overcrowding a causa causans of what occurred to the plaintiff. I agree it is unnecessary for the decision of this case to consider the correctness of the decision of *Pounder* v. *North Eastern Railway Company* (1); but as at present advised I should not be disposed to dissent from it.

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LORD SHAND :—

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My Lords, I agree in holding, for the reasons stated by the noble and learned Earl, that the appeal ought to be dismissed.

As to the overcrowding of the carriage, if this is to be regarded as a separate ground of action because it is said to have facilitated the robbery of the plaintiff by persons described as a gang, the damage is, I think, of a kind too remote to be regarded as the direct or natural consequence of the company's act. It is not alleged that the company's servants were aware that the persons who were allowed to overcrowd the carriage were known as thieves or suspected of any felonious design, and there was nothing to suggest that the overcrowding of the carriage, to which no doubt the plaintiff was entitled to object, would cause more than discomfort to him.

In regard to the other ground of action it is not alleged that the plaintiff intimated that he was prepared to give the persons who had entered the carriage, or certain of them, in charge to officers of police who were in attendance and ready to deal with the charge without delay. His complaint is that "the station-master refused to detain the train to permit the plaintiff to give the said men into custody and have them searched," while in a subsequent part of his statement he alleges: "The said £89 1*s.* was still in the aforesaid compartment of the carriage at the time when the plaintiff complained to the said station-master, and might and would then have been recovered had he afforded time for the necessary search." By these statements I understand that the plaintiff required the train to be stopped in order to have the carriage and his fellow-passengers searched if the police were entitled to do this, and it would depend on the result of this search whether he might give his fellow-passengers, or some of them, into custody on a charge of robbery or not. I agree in thinking that the station-master, who as representing the company was bound to have in view the interests of the passengers generally in regard to the time of starting the train, was not bound under the plaintiff's contract of carriage to accede to his request. The robbery had been completed; but the plaintiff was not in a position to make a charge against his fellow-passengers which could at once and without delay be dealt with, and at all events

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he did not make such a charge. I refrain from making any observations on *Pounder's Case* (1), because in any view which may be taken of the grounds of judgment in that case, the present case on its facts is clearly distinguishable from it.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 4th June 1894.

Solicitors for appellant: *Steadman, Van Praagh, Sims, & Co., for W. L. Wilmshurst, Huddersfield.*

Solicitor for respondents: *R. R. Nelson.*

(1) [1892] 1 Q. B. 385.

[PRIVY COUNCIL.]

J. C.*
1894
May 3.

HOGGAN . . . . PLAINTIFF;

AND

ESQUIMALT AND NANAIMO RAILWAY COMPANY . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of British Columbia—47 Vict. c. 14, s. 23—Construction—"Actual settler for agricultural purposes"—Right of Pre-emption.

Where the appellant claimed as "an actual settler for agricultural purposes" that by sect. 23 of British Columbian Act, 47 Vict. c. 14, he was entitled to a right of pre-emption over certain lands included in a government grant for the purpose of the respondent railway, and it appeared that the land in question had, prior to the Act, been reserved as a town site:—

Held, that a settler means a person entitled to record land under the Land Act, 1875, by reason of compliance with its provisions; that the Act did not apply to reserved lands; that under 47 Vict. c. 14, no new right of pre-emption was given, nor was the word "settler" used in any new sense. Accordingly, the appellant's claim failed, since he was not a settler in the only sense known to the law of the colony.

APPEAL from a decree of the Supreme Court (April 4, 1892), affirming a decree of the Supreme Court of British Columbia (December 13, 1890), which affirmed an order made by Walkem, J. (August 19, 1890), entering up judgment for the defendant, and directing the appellant to deliver to the respondent possession of the lands in suit.

The suit was brought by the appellant for a declaration of his right to purchase from the respondent company 160 specified acres of land in Nanaimo district, Vancouver Island. He claimed as an "actual settler for agricultural purposes" under Provincial statute 47 Vict. c. 14, s. 23, and under Dominion statute 47 Vict. c. 6, s. 7, sub-s. 1. The land in suit was within the area of land granted by sect. 3 of the provincial statute to the Dominion Government, and conveyed to the respondent by letters patent dated April 21, 1887. The respondent counterclaimed for possession of such land as the appellant had got, and alleged, with regard to the rest, that it had been sold to various purchasers by the Crown prior to the Acts relied on, the whole being included in the Newcastle Town site. It also alleged that the appellant had made his improvements, if any, after notice that the land was part of a town site and was not open to settlers; and that he had applied to the government office to pre-empt and been refused.

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* *Present*:—THE LORD CHANCELLOR, LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, and SIR RICHARD COUCH.

The facts are stated in the judgment of their Lordships.

Sub-sect. (*f*) of the agreement incorporated in the provincial Act was as follows:—

"(*f*) The lands on Vancouver Island to be so conveyed shall, except as to coal and other minerals, and also except as to timber lands as hereinafter mentioned, be open for four years from the passing of this Act to actual settlers for agricultural purposes at the rate of $1 an acre to the extent of 160 acres to each such actual settler, and in any grants to settlers the right to cut timber for railway purposes, and rights of way for the railway and stations and workshops shall be reserved. In the meantime and until the railway from Esquimalt to Nanaimo shall have been completed, the Government of British Columbia shall be the agents of the Government of Canada for administering, for the purpose of settlement the lands in this subsection mentioned, and for such purposes the Government of British Columbia may make and issue, subject as aforesaid, preemption records to actual settlers of the said lands. All moneys received by the Government of British Columbia in respect of such administration shall be paid as received into the Bank of British Columbia to the credit of the Receiver-General of Canada, and such moneys, less expenses incurred (if any), shall upon completion of the railway to the satisfaction of the Dominion Government be paid over to the railway contractors."

Sect. 23 of the Act provided that "the company shall be governed by sub-sect. (*f*) of the hereinbefore recited agreement, and each bonâ fide squatter who has continuously occupied and improved any of the lands within the tract of land to be acquired

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by the company from the Dominion Government for a period of one year prior to the 1st day of January, 1883, shall be entitled to a grant of the freehold of the surface rights of the said squatted land, to the extent of 160 acres to each squatter, at the rate of $1 an acre."

The Solicitor General for Scotland (*Shaw*, Q.C.), *Haldane*, Q.C., and *A. T. Ram*, for the appellant, contended that he was on and prior to December 10, 1887, the date of his notice to the respondent of his desire to pre-empt, an actual settler for agricultural purposes on the land claimed by him within the meaning of the Settlement Act, 47 Vict. c. 14. That Act, according to its true construction, superseded all previous reservations of the land by the Government (if any), with certain exceptions which did not apply to this case. The conveyance to the respondent was made subject to the rights of all other parties under the Settlement Act to acquire the same, whether such rights accrued before or after the conveyance, so long as they were acquired within the four years prescribed by the Act. With regard to the character in which he claimed, the judge in his capacity as a jury had found that in March, 1882, the appellant settled on the land in suit, improved and cultivated the same for agricultural purposes, and remained in possession thereof till the present time. Reference was made to *Western Australian Land Company, Limited* v. *Forrest* (1).

Cozens-Hardy, Q.C., *Forbes*, Q.C. (Canada), and *W. H. Clay*, for the respondent, were not heard.

The judgment of their Lordships was delivered by

The Lord Chancellor:—

This is an appeal from a judgment of the Supreme Court of Canada, affirming a judgment of the Full Court of British Columbia, which had affirmed a judgment of Walkem, J.

The appellant commenced an action against the respondents in the Supreme Court of British Columbia, whereby he claimed a declaration that he was entitled under the British Columbia Act, 47 Vict. c. 14, entitled "An Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province," to acquire and purchase from the respondents a certain parcel or tract of land of 160 acres, at the price of 160 dollars. The claim was founded upon sect. 23 of the Act, which provides that "the company shall be governed by sub-sect. (*f*) of the hereinbefore recited agreement." The agreement referred to was one which had been entered into in 1883 between the Government of Canada and the Government of British Columbia respecting the railway of the respondents, and which provided amongst other things for the grant of certain lands by the Provincial to the Dominion Government for the purposes of that railway. Sub-sect. (*f*) is in the following terms: "The lands on Vancouver Island to be so conveyed shall, except as to coal and other minerals, and also except as to timber lands as hereinafter mentioned, be open for four years after the passing of this Act to actual settlers, for agricultural purposes, at the rate of one dollar an acre, to the extent of 160 acres to each such actual settler."

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(1) [1894] A. C. 176.

The lands on Vancouver Island referred to in the sub-section include the land which is the subject of this action.

The case on behalf of the appellant was that he was an actual settler for agricultural purposes; that he claimed the land within four years from the passing of the Act—the Act being passed on the 19th of December, 1883, and his claim being made before the 19th of December, 1887—and that he was therefore entitled to a conveyance of the land to him by the respondents. He founded his claim to be a settler for agricultural purposes upon the fact that he had occupied the land in question, or a portion of it, by erecting buildings thereon, by sowing with vegetables four or five acres of it, and by clearing and preparing for agricultural use some five acres more.

Prior to the Act under which the appellant claims, the Government had reserved a certain tract of land, including the 160 acres in question, as a town site. That is found as a fact, and is not now contested. They had sold off some plots of it to purchasers who were desirous of acquiring land of that description, but it had not been thrown open by them for purchase.

The contention on the part of the appellant is, that whatever might have been the case at the time when this land was Crown property, as soon as the Act to which reference has been made was passed, and at all events, as soon as the land had been conveyed to the respondents, it became open to any settler for agricultural purposes to acquire 160 acres of it, on payment of one dollar an acre.

The appellant had, on two occasions before this action was brought, applied to have his right of pre-emption to the land in question recorded by the Commissioners appointed by statute for that purpose. The application had been twice rejected, and there had been no appeal by him from that rejection. He bases his claim entirely upon the right which he alleges is given by the 23rd section of the Act, incorporating as it does sub-sect. (*f*) of the agreement; and there can be no doubt that, unless he can shew that he is an actual settler for agricultural purposes, entitled to the rights conferred by that sub-section, he has no case at all against the respondents.

Sub-sect. (*f*) uses the term "actual settlers for agricultural purposes," and in considering what is the meaning of the language used, it is necessary to look at the whole of the sub-sect. (*f*).

The lands were to be open for four years from the passing of the Act to actual settlers for agricultural purposes, and in the meantime and until the railway was completed—that is to say, the railway which was in contemplation at the time, and for the purpose of the construction of which lands were conveyed by the Provincial Government to the Dominion Government—the Government of British Columbia were to be the agents of the Government of Canada for administering, for the purposes of settlement, the lands conveyed, and for such purpose the Government of British Columbia were to make and issue pre-emption records to actual settlers.

Neither the agreement, nor the Act itself, contains any definition of the expression "actual settlers for agricultural purposes." But it is important to notice that by the same 23rd section, which by incorporation gives rights to actual settlers for agricultural purposes, rights are given to bonâ fide squatters who have continuously occupied and improved lands within the area acquired by the company, but, in order to give a squatter a right, that land must have been continuously occupied and improved by him for one year prior to the 1st of January, 1883. The term "squatter" is of course well known, and commonly used. It refers to a person who has taken possession of a piece of land and occupied it by buildings or by cultivation, and has by so taking possession of it asserted a right to it; and in the present case, where the possession has been exercised continuously for the period named in the section, the Act converts the possession into a right.

The question now arises, what is a "settler" as distinguished from a "squatter"? It is obvious that the term "settler" found in the agreement means something different from the term "squatter" in the 23rd section of the Act, because the rights which are given to the "squatter" are confined to the case of continuous occupation and improvement of the land for one year prior to the 1st of January, 1883, whilst as regards "settlers" rights may be acquired for four years from the passing of the Act.

The Government of British Columbia are by the terms of sub-sect. (*f*) to issue "pre-emption records to actual settlers;" and in order to understand what is meant by that expression recourse must be had to certain prior legislation in the Colony.

When the Land Act of 1875 (38 Vict. No. 5) is examined, which was in force in British Columbia until a consolidating Act was passed on the 18th of February, 1884, the meaning of the word "settler" becomes sufficiently obvious. By sect. 3 of this Act any person therein specified "may record any tract of unoccupied, unsurveyed, and unreserved Crown lands . . . not exceeding three hundred and twenty acres in extent in that portion of the Province situate to the northward and eastward of the Cascade or Coast Range of mountains, and one hundred and sixty acres in extent in the rest of the Province." By sect. 5 a person desirous of recording such land must stake it out. Sect. 9 provides that upon the applicant for such land complying with certain provisions specified in the Act, and on paying the sum of two dollars to the Commissioner, the Commissioner shall record such land in his favour as a pre-emption claim, "and shall give to such applicant, hereinafter called a 'settler,' a certificate of such record, according to the form No. 3 in the schedule hereto." Sect. 10 enacts as follows: "The settler shall within thirty days thereafter enter into occupation of the land so recorded; and if he shall cease to occupy such land save as is hereinafter provided, the Commissioner may, in a summary way, upon being satisfied of such cessation of occupation cancel the record of the settler so ceasing to occupy the same, and also improvements and buildings made and erected on such land shall be absolutely forfeited to the Crown, and such settler shall have no further right therein or thereto." Sect. 11 provides that "the occupation required shall mean a continuous bonâ fide personal residence of the settler, his agent, or family on the land recorded by such settler." A settler, therefore, is obviously defined by this Act by implication as a person who has complied with its requirements, and so obtained a right to record land under its provisions. Unless he occupies land recorded in the manner provided by the Act it appears clear that he is not a settler within its meaning and obtains no right under it.

Now it is only in respect of unoccupied, unsurveyed, and unreserved Crown lands under that Act that there can be any right of settlement obtained, because the Act only applies to such lands. Inasmuch, therefore, as the land in question in the appeal had been reserved as a town site, it could not be affected by any claim of any person as a settler under the Land Act. Is there anything in the Island Railway Act of 1883 which enables a person to become a settler, or gives him any right of pre-emption as a settler in respect of any lands which, being reserved lands, were not capable of being settled in that sense under the Land Act? Their Lordships are unable to find anything in the Island Railway Act to indicate that there was any such intention; that any lands which down to that time were not capable of being occupied by a settler within the meaning of the Land Act, and in the manner prescribed by the Land Act, became by reason of the Island Railway Act capable of such occupation.

When the language of the latter Act is examined, it obviously contemplates that in the case of settlers there shall be a pre-emption record, and that a settler is only a person who has obtained that record by pursuing the means prescribed by the statute.

The object of sub-sect. (*f*) in the Island Railway Act appears to have been this—that it was not desirable that while the railway was in course of construction the lands should be incapable of any settlement, and inasmuch as being destined ultimately to be the property of the railway, there would be no one who could during the period of construction provide the requisite machinery for transferring the lands, or putting the lands into the possession of persons who were desirous of occupying and cultivating them, the Provincial Government was, during that period, to deal with these lands (though ultimately they were to become the lands of the railway company), just as it had dealt with them prior to the passing of the Island Railway Act, the Commissioner receiving the necessary documents, and giving the necessary records then as before.

It is quite true that in the present instance, as events have turned out, and it is said as contemplated by the Island Railway Act, a short period elapsed between the completion of the railway by the respondents, and the expiry of the four years; but there is certainly no machinery contained in that Act which provides for the respondents during any such interval occupying the position of the Provincial Government, and doing that which certain officials of the Provincial Government were to do in a certain prescribed manner. Whatever may have been the cause which led to that interval being possible, their Lordships are of opinion that it was not the intention of the Legislature that any new right of pre-emption should be given; that the word "settler" should be used in any new sense; or that any one should be capable of being a settler who had not been capable of being a settler in respect of those lands under the pre-existing law.

The contention, therefore, on behalf of the appellant appears to their Lordships to fail. The truth is that, unless it be by reason of a compliance with the provisions of the Land Act, there seems to be no distinction between a "squatter" and a "settler." Their Lordships inquired of the learned counsel for the appellant how they distinguished between the two terms. It was suggested that a settler under the Act must be a settler for agricultural purposes; but a person settling or occupying for agricultural purposes may be as much a squatter as a person occupying for other purposes. Indeed the learned counsel for the appellant entirely failed to suggest any distinction between the case of the squatter and the case of the settler, unless by the word "settler" were meant a person capable of and entitled to settle under and in pursuance of the provisions of the Land Act. It being clear that the appellant was not in that position, their Lordships are of opinion that the judgment appealed from must be affirmed, and the appeal dismissed with costs; and they will humbly advise Her Majesty accordingly.

Solicitors for appellant: *Harrison & Powell.*
Solicitors for respondent: *Hepburn, Son & Catcliffe.*

[PRIVY COUNCIL.]

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April 27;
June 9.

MOHAMIDU MOHIDEEN HADJIAR . . PLAINTIFF;

AND

PITCHEY . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Law of Ceylon—Fiscal Sale of Testator's Estate—Judgment against Executor who has not Proved—Effect of Application for Probate.

A creditor of a deceased debtor cannot sue a person named as executor in the will of the deceased unless he has either administered or obtained a grant of probate; and a sale in execution of a judgment obtained against such person does not bind the deceased's estate:—

Held, overruling the Court below, that an order for probate without

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* *Present*:—LORD HOBHOUSE, LORD ASHBOURNE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

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an actual grant thereof does not prove the will; and that an application for probate does not shew an executor's acceptance of its trusts.

Douglas v. *Forrest* (4 Bing. 686), cited by the Court below, explained and approved.

Letters of administration, even if irregularly granted, are valid till revoked.

APPEAL from a decree of the Supreme Court (Aug. 14, 1891), affirming by a majority a decree of the District Court of Colombo (April 27, 1891), Clarence, J., dissenting.

The facts are stated in the judgment of their Lordships.

All the judges upheld the widow's renunciation of the joint will, and agreed that the result thereof was that the property in suit devolved half to her and half according to the provisions of the will; but at the same time agreed that the appellant, who claimed under a conveyance from the widow, had no title to her moiety, and that the respondent, who bought at a sale in execution of a decree to which she was not a party, was entitled. No reason was given for either ruling.

With regard to Pasqual Fernando's moiety, Burnside, C.J., and Dias, J., held that the grant of letters of administration to Mack was void; that Susy Fernando Bastian Appu had accepted the trusts of the will by electing to prove the same that a judgment against him bound the testator's estate. Clarence, J., held that as Susy had never taken out probate nor administered, a sale in execution of a judgment against him was inoperative to pass title; and that as Mack held letters of administration he represented the estate until they were revoked.

Cozens-Hardy, Q.C., and *Cowell*, for the appellant, contended that the appellant derived a good title direct from the widow and Mack. The widow's moiety, at all events, had never passed to the respondent, either by her own act or by any process of law against her, while she had executed a conveyance thereof to the appellant. None of the judges had assigned any reason for holding that under those circumstances the respondent had a good title thereto, while the appellant had none. With regard to Pasqual Fernando's moiety, they submitted that Clarence, J.,

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was right in holding that the fiscal sale was inoperative to pass title to it. The sale could not pass title to either moiety. The judgment in execution of which it was held was obtained by default in an action to which the widow was not a party, without any evidence of the claim, of the joint will, of the widow's repudiation, or of any proceedings which fixed the defendant as the legal representative of the testator's estate. The purchaser omitted at his own risk the duty of seeing that as regards one moiety probate had been obtained, and that as regards the other the widow had been made a party. Reference was made to *Denyssen* v. *Mostert* (1); *Dias* v. *De Livera* (2), and *Scorey* v. *Scorey's Executors* (3), as to the effect of renunciation of the joint will; to Thomson's Laws of Ceylon, vol. i. pp. 508, 510, 511, as to the necessity of probate: *Douglas* v. *Forrest* (4). Even taking the oath as executor does not preclude renunciation: *M'Donnell* v. *Prendergast* (5); *Jackson* v. *Whitehead* (6). Here the executor had not been sworn in nor taken any step after the widow's repudiation had been filed in Court.

Finlay, Q.C., and *Doyne*, for the respondent, contended that Susy Fernando sufficiently represented the estate. He had never renounced. The only necessity for probate is as evidence of the will in a Court of Law. The will was proved at the time of granting letters of administration to Mack, and that related back; so that a person nominated by the will as executor fitly represented the estate for the purpose of obtaining judgment against it. Susy Fernando intermeddled with the estate sufficiently to have it all valued. He took steps to obtain probate and offered all necessary evidence for that purpose, and he never formally withdrew. That was sufficient to shew an election to administer to an extent which rendered him liable to be sued before probate by creditors whose rights were not to be impeded by his delay. Reference was made to Williams on Executors, 9th ed., p. 257, citing *Douglas* v. *Forrest* (4), and

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(1) Law Rep. 4 P. C. 236.

(2) 5 App. Cas. 123.

(3) Menzies' Cape of Good Hope Rep. Bk. 2, p. 231.

(4) 4 Bing. 686, 704; S.C. 1 M. & P. 663.

(5) 3 Hagg. 214, and see also p. 774.

(6) 3 Phill. 577.

8th ed. vol. ii. pp. 1940, 1985, 1994. As to the effect of probate, see p. 557.

Cozens-Hardy, Q.C., replied.

1894. June 9. The judgment of their Lordships was delivered by

LORD MACNAGHTEN :—

The question raised on this appeal relates to the title to certain premises assessment, Nos. 54 and 55 (formerly No. 55), situated in Bankshall Street, Colombo, which the appellant seeks to recover from the respondent, who is in possession, and has been in possession for some years.

The premises in dispute formed part of the common matrimonial estate of Pasqual Fernando Anthony Pullé, and Ana Selembrem, his wife, who married in community of goods.

On the 28th of November, 1881, the husband and the wife duly made a mutual will disposing of their property and nominating seven persons to be executors.

The husband died on the 11th of September, 1882.

On the 27th of November, 1882, the widow by deed repudiated the will and elected to take her moiety of the common estate in her own right.

On the 5th of December, 1882, Susy Fernando Bastian Appu, one of the executors named in the will, applied for probate. Affidavits were produced deposing to the due execution of the will, together with an affidavit by the applicant himself deposing to the death of the testator and to the value of the estate. A motion was made that probate might be granted to the applicant on his taking the usual oath of office, and an order to that effect was pronounced by the District Judge.

On the 13th of February, 1883, the widow's deed of renunciation was filed in the District Court.

Susy Fernando Bastian Appu did not take the oath of office or proceed further with his application for probate. It is not suggested that he ever intermeddled with the testator's estate.

The other persons named as executors in the will did not intermeddle with the estate or apply for probate.

On the 22nd of February, 1883, Mrs. Savanna Fernando brought a suit in the District Court upon a promissory note for Rs. 500 made by the testator and dated the 6th of September, 1882, against Susy Fernando Bastian Appu as executor, alleging that he had proved the will "and duly obtained probate thereof." The defendant did not enter an appearance, and a decree was made to the effect that the plaintiff should recover from the defendant Rs. 500 with interest at 9 per cent. per annum from the date of the note, and the costs of the suit.

According to the law in force in Ceylon, an executor there has, it appears, the same power over his testator's real estate as an executor in this country has over his testator's personal estate.

Under an execution upon the judgment against Susy Fernando Bastian Appu, the Fiscal seized the premises which are the subject of this suit. On the 31st of August, 1883, he put up for sale and sold the right, title, and interest of Susy Fernando Bastian Appu therein.

On the 21st of December, 1887, Susy Fernando Bastian Appu died.

On the 11th of September, 1888, letters of administration to the estate of the testator with the will annexed were granted to John William Mack, the secretary of the District Court, who applied for such administration at the request of the Commissioners of the Loan Board, who were creditors of the estate.

On the 14th of December, 1888, Mr. Mack as such administrator applied for and obtained the authority of the District Court to sell the premises 54 and 55 Bankshall Street. They were accordingly put up for sale by auction. They were bought by the appellant, to whom they were conveyed by deed dated the 12th of July, 1889, duly executed by Mr. Mack, the administrator, and by Ana Selembrem, the widow of the testator and her then husband.

The appellant thereupon brought this suit to recover the premises. The respondent resisted the claim, founding his title on the Fiscal's sale in August, 1883.

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The sole question on the appeal was whether the sale by the Fiscal bound the estate of the testator. It was admitted that in the event of its being held that the estate was not bound by the sale it would not be material to consider whether the widow's deed of renunciation was valid or not. Nor was it disputed before their Lordships that the letters of administration must be treated as valid until revoked, although they were held to be "void" and "unlawful" by the learned judges in the Courts below, who seem to have been under the impression that Susy Fernando Bastian Appu was still living, and the duly constituted legal representative of the testator.

The Acting District Judge held that there could be no doubt that Susy Fernando Bastian Appu did not take out probate, but that it was "equally clear that he duly proved the will"; that, consequently, he was properly sued as representing the testator's estate, and that the Fiscal's sale was therefore a good and valid sale.

On appeal, the Supreme Court, Clarence, J., dissenting, upheld the judgment of the District Court upon the same grounds, except that they held, contrary to the opinion of the District Judge, that the will took effect only as to one-half of the common estate.

Their Lordships are unable to concur with the Court of Appeal. A creditor of a deceased debtor cannot sue a person named as executor in the will of the deceased unless he has either administered, that is, intermeddled with the estate, or proved the will. The proposition is laid down in the very case of *Douglas v. Forrest* (1), to which Dias, J., in the Supreme Court, as well as the District Judge, referred. The learned judges who formed the majority of the Court of Appeal, and the District Judge, appear to have thought that a will is proved within the meaning of the language used by Best, C.J., in *Douglas* v. *Forrest* (1), as soon as an affidavit deposing to the due execution of the will is submitted to the Court of Probate, and accepted as evidence by the Court. It is, however, obvious that the expression in question is merely a compendious form of language signifying that the will has been proved in due form, and that probate has

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(1) 4 Bing. 686.

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been granted by the proper Court. That is the proper and legal meaning of the phrase. For example, if one turns to Stephen's Commentaries, a text-book of authority, it will be found stated among the duties of executors that the executor must "*prove the will* of the deceased, or (as it is otherwise expressed) take out *Probate*," bk. II. pt. ii. ch. 7. It is perfectly clear that Susy Fernando Bastian Appu, not having obtained a grant of probate, did not represent the estate of the deceased in the creditor's action, and that consequently the seizure and sale of part of the testator's assets, under an execution founded upon a judgment in a suit so constituted, was ineffectual to bind the testator's estate.

It would certainly be a most dangerous doctrine to hold that creditors could tear an estate to pieces on going through the form of an action against a person who had neither intermeddled with the assets nor duly clothed himself with a representative character, so as to become responsible for his acts and defaults to the beneficiaries under the will.

It has been held that an executor, even after taking the oath of office, may renounce before probate is actually granted. The suggestion which was thrown out that an executor by applying for probate has conclusively accepted the trusts of the will, does not seem to merit serious consideration.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal ought to be allowed, that the judgments of the Courts below ought to be discharged, and that judgment ought to be entered for the appellant with costs. The respondent will pay the costs of the appeal to the Supreme Court and of this appeal.

Solicitors for appellant: *Parker, Garrett, & Parker.*
Solicitor for respondent: *S. Spofforth.*

[PRIVY COUNCIL.]

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April 9, 11;
June 9.

MUNICIPAL COUNCIL OF SYDNEY, AGRICULTURAL SOCIETY OF NEW SOUTH WALES, AND SYDNEY DRIVING PARK CLUB, LIMITED . . . APPELLANTS;

AND

ATTORNEY-GENERAL FOR NEW SOUTH WALES AND MILROY . . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Crown Lands Alienation Act, s. 5—Dedication of Lands as "Permanent Common"—Common of Pasturage—Construction.

Where by notice under sect. 5 of the Crown Lands Alienation Act, which authorizes the dedication of Crown Lands for any pasturage common or other public purpose, the Crown dedicated the lands in suit as "permanent common":—

Held, that this dedication meant that the lands were to go for ever for the common or public enjoyment, so as to bring them within the operation of the Public Parks Act, and did not create a common of pasturage.

APPEAL from a decree of the Supreme Court (Oct. 4, 1892), whereby it was ordered that the plaintiff's statement of claim should stand dismissed, and it was declared that the twenty-five acres of land in the pleadings mentioned formed part of the common dedicated by a notice in the Government *Gazette* of the 5th day of October, 1866, and that a lease dated the 5th day of September, 1881, in the pleadings mentioned was void, and should forthwith be delivered up to be cancelled; and whereby it was further ordered that the appellants should be enjoined from charging for the admission of any member of the public to the said twenty-five acres, or from excluding any member of the public from any part of the same.

The facts are stated in the judgment of their Lordships.

The question raised was whether the Agricultural Society and the Driving Club above mentioned were entitled, under the authority of the municipal council, to make a charge for the admission of the public to the said twenty-five acres of land, being part of 490 acres, near the city of Sydney, known as Moore Park, on occasions when agricultural shows, cricket, and football matches, horse-races, and similar entertainments, promoted and conducted by the Agricultural Society and the Driving Club, were taking place thereon.

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* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, and LORD MACNAGHTEN.

The judge decided the question on the footing that the twenty-five acres were part of a pasturage common in the ordinary legal sense, and that the buildings and fences thereon and the charge for admission were an interference with the rights of commoners, and that the Crown was in the same position as a lord of a manor in England, and as such entitled to the fee simple of the land and to pasturage in common, and to restrain any interference with its own rights in these respects, or with the rights of other commoners. The judge did not determine who were the commoners, but on this point merely expressed a doubt whether they would be all the inhabitants of the colony, or whether they must not be limited to persons living in proximity to the common.

Crackanthorpe, Q.C., and *Warrington*, for the appellants, contended that the declaration on which the decree was founded was not that which was sought by the information. It was never alleged that the twenty-five acres were part of a pasturage common; or that any persons were entitled as commoners; or that the Crown was interested therein in any way similar to a lord of the manor or as a commoner. If the suit had been founded on such an allegation, it would have been met by a plea of estoppel to the effect that the appellants had expended, to the knowledge of the respondent and the public, large sums of money on the faith of the notice of the 15th of August, 1871, which expressly states that the lands were dedicated for purposes of public recreation. The proceedings in truth were directed to establish (1.) that the public were entitled to enter the twenty-five acres for purposes of public recreation, and had been prevented; (2.) that the granting the lease of the 5th of September, 1881, which involved the user of the twenty-five acres to the exclusion of the public, except on payment for admission, the municipal council had committed a breach of trust. As regards the theory that the 490 acres had been dedicated to the purpose of a pasturage common in the ordinary legal sense and with its ordinary incidents, it was contended that the true construction and effect of the notices referred to in the judgment did not support that view. Their effect was to dedicate the land for purposes of public recreation. Even if the theory were right, there was no evidence that the appellants' user of the land had prejudicially affected any rights of pasturage. It was contended that the appellants' user of the land was a lawful user, and beneficial to the public; that contributions from the public were necessary; that without them, shows and matches, and similar modes of public recreation, could not have been held; that a charge for admission was a reasonable mode of obtaining contributions; that no member of the public was excluded, for he could enter free by certain gates.

[Reference was made to *Attorney-General* v. *Proprietors of Bradford Canal* (1), *Attorney-General* v. *Sheffield Gas Company* (2), on the question of laches and acquiescence in regard to an alleged public injury.]

The Solicitor-General (Sir *John Rigby*), *Lynn*, and *Alfred Adams*, for the respondents, contended that the judge of the Court below was right in granting the relief prayed, i.e., in directing the lease of the 5th of September, 1881, to be cancelled, and in restraining the Driving Club by injunction from charging for the admission of any member of the public. They contended that the land could only be used for the purpose for which it had been dedicated by the notice in the *Gazette* of the 5th of October, 1866. That purpose was expressed to be a "permanent common." Under sect. 5 of the Crown Lands Alienation Act (25 Vict. No. 1), permanent common means, according to the true construction of the section, a permanent pasturage common. The dedication was valid and complete only so far as it devoted the land to pasturage common, leaving

(1) Law Rep. 2 Eq. 71, 81.

(2) 3 D. M. & G. 304.

MUNICIPAL COUNCIL OF SYDNEY, AGRICULTURAL SOCIETY OF NEW SOUTH WALES, AND SYDDEY DRIVING PARK CLUB, LIMITED *v.* ATTORNEY-GENERAL FOR NEW SOUTH WALES AND MILROY.

it may be to subsequent declarations to state what were the rights of the commoners and who were to be entitled thereto. By sect. 6 of the Act, all lands permanently reserved for any of the purposes mentioned therein are deemed to be set apart, attached, and dedicated accordingly. And the lease in question, not having been made for the purpose for which such reservation was made, was absolutely void both as against the Crown and all other persons. It was ultrà vires the municipal council to grant the lease, for they only held the lands as trustees for the purposes for which it was dedicated. On this view, it was unlawful for the Agricultural Society to fence in the twenty-five acres and to erect buildings thereon, and for the Driving Club to refuse members of the public free access thereto. Such lease was void, moreover, under sect. 11 of the Commons Regulation Act of 1873, which forbids trustees of any common to grant leases of portions thereof for any purpose or on any condition.

Crackanthorpe, Q.C., replied.

The judgment of their Lordships was delivered by

1894
June 9.

LORD HOBHOUSE :—

The main question in this appeal turns on the effect of a dedication of Crown land in Sydney made by the Crown in the year 1866, under the powers given by the Act of 1861 (25 Vict. No. 1) for regulating the alienation of Crown lands. By the decree appealed from, certain arrangements made or permitted by the appellants, the municipal council of Sydney, for the purpose of allowing agricultural shows and races to be held by the other appellants on a portion of the dedicated land, are declared to be void, and injunctions have been granted to prohibit them. The Attorney-General of New South Wales, who appears as a respondent, seeks to maintain the decree on the ground that the land is dedicated as a pasturage common, and cannot lawfully be used for other objects.

The Crown Lands Alienation Act defines Crown Lands to mean "All lands vested in Her Majesty which have not been dedicated to any public purpose, or which have not been granted or lawfully contracted to be granted in fee simple." And by sect. 5 it enacts that "the Governor with the advice aforesaid" (the advice of the Executive Council) "may by notice in the *Gazette* reserve or dedicate in such manner as may seem best for the public interest any Crown lands for"; then follow a number of specified purposes, ending with "or for any pasturage common, or for public health, recreation, convenience, or enjoyment, or for the interment of the dead, or for any other public purpose."

A notice was published in the Government *Gazette*, under date the 5th of October, 1866, as follows:—

"Department of Lands,
"(2362) "Sydney, 5th October, 1866.

"His Excellency the Governor, with the advice of the Executive Council, has been pleased to dedicate the Crown lands hereunder described to the several public purposes mentioned in connection therewith, abstracts of such intended dedications having been duly laid before Parliament in accordance with the 5th section of the Crown Lands Alienation Act of 1861.

"J. Bowie Wilson."

Then follows the schedule relating to many parcels of land, and among them the parcel now in dispute. Its place is mentioned as Sydney, its extent as 490 acres, and its purpose as "permanent common."

The Public Parks Act of 1854 (18 Vict. No. 33) recites that it "is expedient that bodies of trustees with perpetual succession should be created for the purpose of holding, managing, and protecting lands granted for or dedicated to purposes of public recreation, health, convenience, or enjoyment." It enacts that the Governor may, without any grant by the Crown, appoint trustees of lands so dedicated, and that they shall be a body corporate. And by sect. 5, "The trustees appointed by virtue of this Act shall have the powers of absolute owners (except for the purposes of alienation in respect of the land granted to or placed in trust under them), and it shall be lawful for them to make such rules and regulations for the protection of the shrubs, trees, and herbage growing upon such lands, and for regulating the use and enjoyment of such lands, and for the removal of trespassers thereon, and other parties causing annoyance or inconvenience thereon, as to them shall seem necessary or expedient."

A notice was published in the Government *Gazette*, under date, Department of Lands, Sydney, the 15th of August, 1871, as follows:—

"(1782.)

"It is hereby notified for public information that his Excellency the Governor, with the advice of the Executive Council, has been pleased to approve of the appointment of the Municipal Council of Sydney as trustees of the portions of land in the city of Sydney, dedicated for public recreation, the particulars of which are set out in the accompanying schedule.

"J. Bowie Wilson.

"(Nos. 71, 1121.)"

The schedule contains the 490 acres in question. They are there stated to have been dedicated by notice in the *Gazette*, the 5th of October, 1866.

On the 5th of September, 1881, the municipal council executed a deed whereby they purported to let to the Agricultural Society of New South Wales about twenty-five acres of land, situate at Moore Park, Sydney, at a yearly rent of £10. The lease is to endure from the 1st of July then last during the will of the lessors only, or until notice given as therein mentioned. The lessors may determine the tenancy after fourteen days' notice in writing. The lessees are to hold the demised land for the purpose only of shows or exhibitions, and they undertake to keep the land drained and cleaned under the directions of the lessors' engineer, and to comply with the lessors' regulations as to access by the public.

The demised twenty-five acres are part of the dedicated land, which appears to be called "Moore Park." According to the evidence they are a low-lying portion of the ground, very wet and swampy when taken by the Agricultural Society, who have drained them and made them fit for use. It appears that they are fenced round in some way, and that the enclosure can be entered at some points by turnstiles or by a carriage-way, at both of which payment is made for entrance, and from another direction by gates which can be passed without payment. Within the enclosure the society hold their agricultural shows, and by arrangement with them the Driving Club hold pony races. It is stated that the expense was borne half by the society and half by the Government.

The condition of things is stated by Mr. Webster, the secretary of the society, whose evidence does not appear to be contradicted. He says:—

"It (the land) was very rough and trees growing on it, and considerably below the level Moore Park had been made up to. It was all a swamp. At the first show the centre of the ground was three feet under water in 1882. The society has filled it in and well drained it. It is now fairly dry. Stables and pens erected. Pavilions and offices. All the requirements for a first-class agricultural show. The cost was £32,000 since 1881. That included the Government subsidy of £1 for £1.

"The Government gave £5000 when the land was first taken up on condition that £1 for £1 was obtained. The £5000 was given to start it. Ponies compete for prizes given at our show, just as we have jumping competitions. It is not true that people are totally excluded without payment.

"There are turnstiles where people pay for going in. There is also a gate on the Moore Park or Randwick Road side, and one on the rifle range without any turnstile. Through these gates the public can go without payment. They are always open. The turnstiles register everybody who goes through, and so we can see what cash the turnstile man takes, so much for adults and so much for children. There were over 50,000 people at the last show. 46,000 paid. Subscribers and exhibitors, soldiers, and sailors do not pay. Wednesday is the driving park day. Saturday, cricket in summer and football in winter. The admission is 1*s.*, ordinary matches 6*d.* The members' gate and other gates are always open. When no football, cricket, or trotting matches are on, the grounds are open; very few of the public go in, one or two."

The same witness shews that other parts of the 490 acres have been appropriated in similar ways for cricket and football, and for zoological gardens, the practice apparently beginning soon after the appointment of the municipal council as trustees. Speaking in 1892, the witness says, "this has been going on for seventeen or eighteen years." No question is raised in this suit as to such other parts, but the nature of the dedication must affect all alike.

In October, 1891, an information on the relation of the respondent Milroy, joined with a claim by him, was filed against the three appellants. It states that by the notice of the 15th of August, 1871, the Governor duly dedicated the lands to the purpose of public recreation. It complains that members of the public, including the plaintiff, who desire to enter the demised twenty-five acres for the purpose of public recreation are prevented from doing so. It prays a declaration that the twenty-five acres are held by the municipal council upon trust for the purpose of public recreation only, the avoidance of the lease, and injunctions to restrain the exclusion of the public and the exaction of payment.

The learned chief judge in equity who heard the cause held that the rights of the public and of the parties turned upon the construction of the dedication of 1866.

On that point his opinion is stated as follows:—

"The 5th section of the Crown Lands Alienation Act, under which this dedication is expressed to be made, authorizes the dedication of Crown lands as a 'pasturage common.' And such it is clear this common must be. In England there are various kinds of common, such as a common of fishing in rivers or lakes; a common of turbary, conferring the right of cutting turf; a common of estovers, conferring a right to lop timber; and a common of right to dig for coal, minerals, and the like; but the most usual form of common is that of pasturage, and unless it be otherwise expressed a dedication of grass land as a common can only mean a common of pasturage.

"It was contended that the words in this dedication 'permanent common' meant only a place of public recreation.

"I am clear they have no such meaning."

As for the difficulty that no commoners are specified, he meets

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it by holding that the rights of a common are necessarily limited to those who live in proximity to the common. As regards the frame of suit, he holds that the Crown is in the position of the lord of an English manor; that it has an equal right of pasturage with the commoners, and can sue for itself and the commoners who claim under it. The plaintiff's claim he thinks to be a mere sham, and he dismisses it with costs. He does not discuss the difference between commoners and the public, or the circumstance that his view is as adverse to the view of the dedication which is taken by the information as to that which is taken by the defendants.

The decree declares that the twenty-five acres form part of the common dedicated by the notice of the 5th of October, 1866, and that the lease of September, 1881, is void. It directs the lease to be cancelled, and it restrains the lessees and the Driving Club from excluding any member of the public from the twenty-five acres or any part thereof at all reasonable times, and from making any charge to any member of the public for entrance thereto.

It is to be remarked that the decree does not declare the twenty-five acres to be subject to common of pasturage. It declares it to be part of the common established in 1866, which nobody has disputed. By reference to the learned judge's reasons we find that he interprets the *Gazette* of 1866 to mean common of pasturage. But then the decree goes on to protect the public only, not the commoners nor the lord. Now, if the common is for pasture, and belongs to those who are in proximity, it is difficult to see why the public should have a decree made on their behalf invalidating the transactions in question. The decree seems to rest partly on the ground that there is common of pasturage to be protected, and partly on the ground that the Attorney-General sues on behalf of the public, and not on behalf of the lord or of any commoners. The first ground is inconsistent with the case presented by the information, and the second is inconsistent with the view taken by the learned judge.

Passing from these objections and adopting for the moment the supposition that the land was dedicated to pasturage, in what position has the Crown placed itself? The view submitted by the Solicitor-General for the respondents is that the dedication of 1866 is an incomplete act capable of being made complete afterwards; that it is valid and indefeasible so far as it devotes the land to common of pasturage; and that, though subsequent declarations may shew who are the commoners and what are their rights, the Crown cannot make any disposition inconsistent with the dedication.

Even if that view be right, how does it support the case made by the information? The Crown remains the legal owner of the land, and has not designated any other person to possess any interest in it. Until such designation it is surely open in the meantime to the Crown to use the land in any way not inconsistent with its ultimate use for pasturage. What the Crown has done is to treat the land as a recreation ground, to appoint trustees for it on that footing, and to encourage and assist with money the acts that are now complained of. So long as there is nobody interested in the pasturage except the Crown itself, what legal objection is there to this course? The municipal council are only doing what the Crown intended them to do; and their Lordships cannot see what right the Attorney-General has to sue on behalf of the public or of the Crown to restrain them.

Their Lordships feel that the issues dealt with are not the principal ones, and they prefer to rest their judgment on the broad ground that the dedication of 1866 does not create a common of pasturage. If it was intended to create such a right, why should not the Crown have used the statutory expression for it? Its advisers preferred to use a term not to be found in the statute, and yet susceptible of a popular and intelligible meaning. The word "common," it is true, has a technical meaning in England and in New South Wales; though what kind of enjoyment it may indicate, and for what persons, cannot be understood without something more. Standing alone it is an ambiguous term which requires explanation, and which may be explained by circumstances. But further, it is very often used, though inexactly and in popular parlance, to denote land devoted to the enjoyment of the public or of large numbers of people.

And the question is whether it has not been so used in this instance.

It appears to their Lordships that there are several considerations, some more and some less cogent, all bearing the same way. The departure from the words of the statute, though consistent with the ultimate use of the land for pasturage, suggests that the Crown had not then any intention of irrevocably fastening upon the land any of those precise modes of enjoyment which the statute mentions. The omission to name commoners, or in any way to define the nature of the common, is more consistent with the intention of leaving the enjoyment a variable thing and open to all comers, than to give it to a defined class which, even if a large one, must be limited. The contiguity of the land to a populous city suggests that other modes of enjoyment are more suitable than pasturage. Five years after the dedication the Crown, by an equally formal document, treats it as one made for public recreation; and proceeds to appoint trustees accordingly. Since the appointment of trustees, at least for seventeen or eighteen years, the use of the land for different purposes of enjoyment has been constant. It is not a long user, but it has never been disturbed by any claim for pasturage. How strong was the general understanding that the land was actually dedicated to public recreation is shewn by the information itself, which prays a judicial declaration to that effect, and founds its complaint on the defendants' interference with the public enjoyment. Their Lordships find no trace of any contrary view before the delivery of the judgment in this case.

For these reasons they hold that the view taken by the advisers of the Crown and by the authorities and the people of Sydney is also the true legal view; and that the dedication of 1866 in permanent common means that the land is to go for ever for the common or public enjoyment, so as to bring it within the operation of the Public Parks Act.

If that be so, the appointment of trustees in 1871 is valid, and the only question that remains is whether the municipal corporation has dealt with the land in a way which is authorized by the powers conferred on them by the Parks Act. On this point

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no complaint has been made at their Lordships' bar, and it does not appear that there is any dissatisfaction among the people of Sydney, who might shew it, if felt, very effectually in their municipal elections. There is a very general liking for animal shows and races, and a general willingness that portions of public ground should be taken for such things, and money paid for good positions to enjoy them, inasmuch as without these payments the enterprises could not be maintained, and the enjoyment derived by the public from the land dedicated to their recreation would be less and not greater. By the evidence of Webster it appears that the inhabitants of Sydney are not behind the rest of the world in their readiness to see sights and to pay for them. Their Lordships think it impossible to say that the lands are not being used and enjoyed with due regard for the rights and interests of the public.

The result is that in their Lordships' judgment the Court below ought to have dismissed the whole suit with costs. They will now humbly advise Her Majesty to discharge the decree appealed from except so far as it dismisses the claim with costs, and to dismiss the information with costs. The respondents must pay the costs of this appeal.

Solicitors for appellants: *Young, Jones & Co.*
Solicitor for respondents: *Reginald Bridger.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1894
July 30.

THE EDINBURGH STREET TRAMWAYS COMPANY . . . . APPELLANTS;

AND

THE LORD PROVOST, &c., OF EDINBURGH . . . . RESPONDENTS.

Tramway—Purchase of Undertaking by Local Authority—Terms of Purchase—Valuation of Tramway—Rental Value—Tramways Act, 1870 (33 *&* 34 *Vict. c.* 78), *s.* 43—*Edinburgh Tramways Act,* 1871 (34 *&* 35 *Vict. c. lxxxix.*).

By sect. 34 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), it is enacted that the promoters of tramways authorized by special Act and their lessees shall have the exclusive use of their tramways for carriages with flange wheels, or other wheels suitable only to run on the prescribed rail.

By sect. 43, where the promoters (in this case the appellants) of a tramway in any district are not the local authority, the local authority may, within six months after the expiration of a period of twenty-one years from the time when such promoters were empowered to construct such tramway . . . . by notice in writing require such promoters to sell . . . . to them their undertaking, or so much of the same as is within such district, upon the terms of paying "the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district." Such value to be in case of difference determined by a referee. "And when any such sale has been made, all the rights, powers, and authorities of such promoters in respect to the undertaking sold . . . . shall be transferred to, vested in, and may be exercised by the authority to whom the same has been sold in like manner as if such tramway was constructed by such authority under . . . . a provisional order under this Act, and in reference to the same they shall be deemed to be the promoters."

The appellants, the Edinburgh Street Tramways Company, were authorized to construct tramways by the Edinburgh Tramways Act, 1871 (34 & 35 Vict. c. lxxxix.), which incorporated the general provisions of the Tramways Act, 1870. The respondents, the Lord Provost, &c., of Edinburgh—the local authority—gave notice in 1892, under sect. 43 of the general Act, to purchase the appellants' undertaking:—

Held (Lord Ashbourne dissenting), affirming the decision of the Court of Session (21 Court Sess. Cas. 4th Series (Rettie), 688), that, on a sale to the local authority, the local authority become entitled to the exclusive use of the tramway, not by transference of any right from the promoters, but by virtue of the statute alone. Secondly, that the word "tramway" could not be read as synonymous with "undertaking," but was used in the Act as meaning the structure laid down on the highway, and nothing more; therefore the "then value of the tramway" must be measured by what it would cost, at the date of the sale, to construct the lines, subject to a deduction for depreciation, and that rental value must not be taken into consideration.

APPEAL against a decision of the First Division of the Court of Session, Scotland (1), in conjoined actions of reduction of the arbitrator's award and of declarator, raised by the Edinburgh Street Tramways Company, the appellants, against the Lord Provost, &c., of Edinburgh, the respondents.

The question raised was as to the construction of sect. 43 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), and as it was precisely the same as that raised in the English appeal of the *London Street Tramways Company* v. *London County Council* (2), the two appeals were heard together.

The appellants were authorized by their special Act (34 & 35 Vict. c. lxxxix.), which incorporated Parts II. and III. of the Tramways Act, 1870 (33 & 34 Vict. c. 78) (3), and by subsequent

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(1) 21 Court Sess. Cas. 4th Series (Rettie), 688.

(2) [1894] 2 Q. B. 189.

(3) By sect. 19 of the Tramways Act, 1870, it is enacted that a local authority which has completed or acquired possession of a tramway may by lease "demise to any person, persons, corporation, or company, the right of user . . . . of the tramway, and of demanding and taking in respect of the same the tolls and charges authorized, ... but nothing in this Act contained shall authorize any local authority to place or run carriages upon such tramway, and to demand and take tolls and charges in respect of the use of such carriages."

By sect. 34 it is provided that "the promoters of tramways authorized by special Act and their lessees" may use on their tramways carriages with flange wheels, or wheels suitable only to run on the rail prescribed by such Act; and, subject to the provisions of such special Act, and of this Act, the promoters and their lessees shall have the exclusive use of their tramways for carriages with flange wheels, or other wheels suitable only to run on the prescribed rail. . . .

By sect. 41: If at any time after the opening of any tramway . . . . the promoters discontinued the working, for three months, which discontinuance is proved to the satisfaction of the Board of Trade, the Board may declare that the powers of the promoters in respect of such tramway . . . . shall be at an end, and thereupon the said powers of the promoters shall cease and determine, unless the special Acts, to lay down tramway lines in Edinburgh and the neighbourhood. Their present system extends to eighteen and

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same are purchased by the local authority in the manner by this Act provided.

By sect. 42: "If at any time after the opening of any tramway . . . . it appears to the local authority or the road authority that the promoters of such tramway are insolvent, so that they are unable to maintain such tramway . . . . and such road authority makes a representation to that effect to the Board of Trade, the Board may direct an inquiry by a referee . . . . and if the referee shall find that the promoters are so insolvent as aforesaid, the Board of Trade may, by order, declare that the powers of the promoters shall at the expiration of six months . . . . be at an end; and the powers of the promoters shall cease and determine at the expiration of said period, unless the same are purchased by the local authority in manner by this Act provided. . . ."

By sect. 43 it is provided: "Where the promoters of a tramway in any district are not the local authority, the local authority, if, by resolution passed at a special meeting of the members constituting such local authority, they so decide, may within six months after the expiration of a period of twenty-one years from the time when such promoters were empowered to construct such tramway, and within six months after the expiration of every subsequent period of seven years, or within three months after any order made by the Board of Trade under either of the two next preceding sections with the approval of the Board of Trade by notice in writing require such promoters to sell, and thereupon such promoters shall sell, to them their undertaking, or so much of the same as is within such district, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district, such value to be in case of difference determined by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party, and the expenses of the reference to be borne and paid as the referee directs. And when any such sale has been made, all the rights, powers, and authorities of such promoters in respect to the undertaking sold . . . . shall be transferred to, vested in, and may be exercised by the authority to whom the same has been sold, in like manner as if such tramway was constructed by such authority under the powers conferred upon them by a provisional order under this Act, and in reference to the same they shall be deemed to be the promoters."

By sect. 44: "Where any tramway in any district has been opened for traffic for a period of six months the promoters may with the consent of the Board of Trade sell their undertaking to any person, persons, corporation or company, or to the local authority of such district, and when any such sale has been made all the rights, powers, authorities, obligations, and liabilities of such promoters in respect to the undertaking sold shall be transferred to, vest in, and may be exercised by and shall attach to the person, persons, corporation, company, or local a half miles, and runs through the district of four local authorities.

On the 12th of August, 1892, the respondents gave the appellants notice, that they required the appellants to sell, in accordance with sect. 43 of the general Act, so much of the tramways works and undertaking as were within the royal burgh, city, and county of the City of Edinburgh, other than the section from Waterloo Place to Jock's Lodge, as to which the time had not expired. The extent of lines taken extended to eleven and five-sixths miles. The matter was referred to arbitration, and in course of the proceedings the appellants pressed that the owners' rental interest in the tramway lines was a distinct item or part of the subject of sale, which it was the duty of the arbitrator to consider and value. And that the lines should be valued by capitalizing the rent at which one year with another the tramways might in their actual state be reasonably expected to let. The arbitrator rejected this view, issuing his revised draft award on the 27th of September, 1893, which he finally signed on the 13th of November following. By his award he found the sum of £212,979 7*s.* 6*d.* as the value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of so much of the tramways as were taken, and of all lands, buildings, works, material, and plant of the said tramways company suitable to and used by them for the purposes of their undertaking within the City of Edinburgh.

The arbitrator expressed the principle upon which he had proceeded: Secondly, "That in valuing the tramways I am not entitled to take into account the present profits or rental value of the undertaking, but that the proper value of said tramways

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authority to whom the same has been sold, in like manner as if such tramway was constructed by such person, persons, corporation, company, or local authority under the powers conferred upon them by special Act, and in reference to the same they shall be deemed to be the promoters. . . ."

By sect. 57 it is provided, that notwithstanding anything in the Act contained, the promoters of any tramway shall not acquire any right other than that of user of any road along or across which they lay any tramway.

to be determined by me, according to my construction of the statute, is such sum as it would cost to construct and establish the same under deduction of a proper sum in respect of depreciation to their present condition, and that in estimating such cost I am entitled to take into account the fact that said tramways are now successfully constructed and in complete working condition."

Thirdly, "That I am entitled in valuing said tramways according to the cost of construction and establishment to make allowance both for the sums expended by the said company in obtaining said parliamentary authority, in so far as I consider such expenditure necessary or proper, and also for the said sum of £2500," as a proper expenditure by the said company to enable double lines of tramways to be laid over the North Bridge.

The above statement will suffice, as the facts are fully alluded to in the judgments of the Law Peers.

On the 22nd of February, 1894, the Lord Ordinary (Low), assoilzied the Respondents from the conclusions of the conjoined actions, and on the 16th of March, 1894, the First Division of the Court of Session, the Lord President (Robertson) dissenting, adhered (1).

On appeal,

June 8, 12, 14, 15. *Asher*, Q.C. (with him, *A. Graham Murray*, Q.C., and *Vary Campbell*, all of the Scotch Bar), for the appellants :—

The arbitrator was wrong in deciding that he was precluded from taking into account the rental value of the appellants' tramway. The cost of construction is not the value of what the appellants hand over as a going concern. They had the exclusive right to run such carriages as are prescribed by the Act upon the rails of the tramway—a right which they were at liberty to sell or let, and which they held in perpetuity, subject to the purchasing power given to the local authority. By sect. 43 what is to be sold is the "undertaking"—a comprehensive word; and the thing to be paid for is the "then value of the tramway," &c. The word "tramway" includes all the rights possessed in relation to the tramway. The result of the sale was a complete transfer, not merely of the buildings, plant, and materials, but of the whole undertaking as a going concern. Past and future profits are excluded, but not present profits; and the parenthesis is only an intimation not to include anything usually allowed when an owner is compelled to sell. Taking a certain number of years' purchase of the rent a tenant might pay yearly for the use of the tramway is not making any allowance for past or future profits in the value so ascertained. It must not be forgotten that the tramway has been held to be a heritable subject liable to all imperial and local taxes, which are assessed on its rental value.

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(1) 21 Court Sess. Cas. 4th Series (Rettie), 688.

The Lord Advocate (*Balfour*, Q.C.), (with him, *J. Fletcher Moulton*, Q.C.), for the respondents:—

The appellants had nothing more than an exclusive right of easement or occupancy on land which did not belong to them, and this right must not be confounded with, or held to be equal to, the powers resulting from unburdened rights of property in land. By a sale to the local authority under the provisions of the Act this monopoly was transferred, but not from the appellants, but anew from the Legislature, the statute giving the respondents the same rights and powers as if they were the promoters. The appellants are to sell on the then value of the "tramway," and "tramway" is used nowhere in the Act except as meaning the physical structure.

Asher, Q.C., in reply.

Judgment after consideration.

Lord Herschell, L.C.:—

My Lords, in the first of these cases the appellant company was formed under the provisions of a private Act of Parliament in the year 1871. This Act incorporated Part II. and Part III. of the Tramways Act, 1870. Sect. 43 of that Act entitled the respondents, within six months after the expiration of a period of twenty-one years from the time when the appellants were empowered to construct the tramway, by notice in writing, to require the appellants to sell their undertaking. They accordingly, on the 12th of August, 1892, gave notice to the appellants that, in exercise of their rights under that section, they would purchase the appellants' undertaking within the City of Edinburgh. The appellants and respondents having differed as to the price to be paid, the Board of Trade appointed Mr. Henry Tennant, of York, as referee, to fix what the price should be. In the narrative of the award or decree arbitral, which he made, Mr. Tennant stated that, in his opinion, after careful consideration of the terms of sect. 43 of the Tramways Act, 1870, in valuing the tramways, he was not entitled to take into account the present profits or rental value of the undertaking, but that the proper value of the tramways to be determined by him according to his construction of the statute was such sum as it would cost to construct and establish the same under deduction of a proper sum in respect of depreciation for their present condition, and that in estimating such cost he was entitled to take into account the fact that the tramways were then successfully constructed and in complete working condition.

The present conjoined actions were thereupon raised by the appellants against the respondents for the purpose of reducing Mr. Tennant's award or decree arbitral upon the ground that his view of sect. 43 of the Tramways Act, 1870, was erroneous, and for declaration that he ought, under that section, to have fixed the value to be paid by the respondents for the tramways upon the rental basis, and for an order on him to proceed with the reference, and to find and declare the value of the tramway lines according to their rental value.

Both the Lord Ordinary and the First Division of the Inner House have held Mr. Tennant's award to be good, and have assoilzied the respondents.

The question on this appeal is whether these decisions were correct. The question turns on the construction to be put upon the language employed in sect. 43 of the Tramways Act, 1870, which prescribes the terms upon which the promoters of a tramway (in this case the appellants) are to sell their undertaking to the local authority. The words are as follows: "Upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking."

It is contended on behalf of the appellants that the value of the tramway must be ascertained by taking into consideration what rental could be obtained for it if let with all the statutory rights of using it possessed by the promoters, and then allowing whatever may be thought the proper number of years' purchase of the rental which could thus be obtained. The sum so arrived at, it was argued, would represent the then value of the tramway within the meaning of the section.

My Lords, before discussing the language used by the Legislature it is, I think, necessary to consider the nature of the rights and powers of the promoters which it is said are to be thus taken into account, and the manner in which they are conferred upon them.

The promoters obtained authority, in the first place, to interfere with public highways by laying down tramways upon them, and maintaining the tramways so laid down. But the most important power which they obtained was that contained in sect. 34 of the Tramways Act, 1870, which authorized them to use upon the tramways so laid down carriages with flange wheels, or wheels suitable only to run on the rail prescribed by their Act, and provided that, subject to the provisions of their special Act and of that Act, the promoters and their lessees should have the exclusive use of their tramways for carriages with flange wheels or other wheels suitable only to run on the prescribed rail.

It will be seen that the power thus conferred is limited to the promoters and their lessees, the promoters being the person or company authorized to construct the tramways. The right conferred is a personal one, and cannot be claimed by any persons who do not come within the designation of promoters or lessees of promoters. It is not conferred upon the promoters' assignees. A conveyance, therefore, by the promoters of their tramways, or even of their undertaking, would not carry with it the right to the statutory monopoly conferred upon the promoters by the section to which I have referred.

My Lords, I proceed now to consider the words of the provision upon which the question at issue turns. It is to be observed that, although the undertaking is described as the subject of the sale, it is to be sold, not upon terms of paying its then value, but upon terms of paying "the then value of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking." It appears clear that the word "tramway" cannot be read as synonymous with "undertaking." The words which follow "tramway" are, to my mind, conclusive upon this point. What, then, does "tramway" mean as used in the section? I have examined every instance of its use in the statute, and it appears to me in every other case, at all events, to be used to describe the structure laid down on the highway, and nothing more, and I cannot see my way to give any other meaning to it in the section under consideration. The word "tramway" may, no doubt, without impropriety be held to include all proprietary rights attached to it; but I do not think that it can with propriety be held to comprise all the powers in relation to the tramway which are conferred by the statute upon the promoters.

I have already pointed out that the power exclusively to use the tramway was granted to the promoters as such, and is not capable of transfer by them. This is distinctly recognised by the enactment which immediately follows that under consideration. It is provided that when a sale has been made all the rights, powers, and authorities of the promoters in respect to the undertaking sold shall be transferred to, vested in, and may be exercised by the authority to whom the same has been sold in like manner as if the tramway was constructed by such authority under the powers conferred upon them by a provisional order under the Act, and in reference to the same they shall be deemed to be the promoters. It is by virtue of this enactment, and of this alone, that the local authority become entitled to the exclusive use of the tramway, which was previously vested in the promoters. It is the statute, and not the company which originally constructed the tramways, which confers upon the local authority this right.

It is also worthy of note that some, if not all, of the rights, powers, and authorities of the promoters are treated as not included even in the term "undertaking," inasmuch as they are spoken of as the rights, powers, and authorities of the promoters "in respect of the undertaking sold."

My Lords, I have so far dealt with the language of the section, without taking into consideration the words within the parenthesis, upon which so much of the argument turned; what was to be paid by the purchasers was the then value of the tramway, "exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever."

It was contended for the appellants that the presence of the parenthesis indicated that in the opinion of the Legislature the term "value of the tramway" would, but for the words in the parenthesis, have justified an allowance for past or future profits of the undertaking, and must therefore include something more than the value of the structure. I cannot assent to this argument. The words of the parenthesis may well have been enacted by way of precaution, to make sure that countenance was not given to any contention which would have involved fixing a sum in excess of the value of the structure. There is, I think, a fallacy involved in considering the meaning of the words which follow the parenthesis by themselves, and then inquiring how far the meaning thus attributed to them is to be modified by reason of the words which precede. Each part of the provisions throws light on the other. It is by reading it as a whole that the intention of the Legislature is to be ascertained. The words found within the parenthesis, to my mind, support the view that "tramway" is to be construed in the manner which I have indicated, and not in that contended for by the appellants. It is said that the words "exclusive of any allowance for past or future profits of the undertaking" were introduced for the purpose of preventing the arbitrator making any addition to the value otherwise arrived at in respect of such profit. I find it difficult to understand how it could ever be

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supposed that an arbitrator would make any addition to the value of the tramway in respect of the past profits of the undertaking, or how it could ever have been thought necessary to prohibit his doing so. It is, however, quite intelligible that it might be thought necessary to guard against his allowing for, or, in other words, taking into account past profits in arriving at the value of the tramway. But if the word "allowance" is used in this sense in relation to past profits, its meaning must be the same in relation to future profits. I therefore construe the words as enacting that neither the profits made in the past nor to be anticipated in the future were to be taken into account in assessing the value.

It was argued that if the value of the tramway were arrived at by taking so many years' purchase of the rental which could have been obtained for it, if let, no profits would be allowed for in the value so ascertained. I am unable to adopt this view. How would it be possible to determine the rental which could be obtained except by reference to the profits which had been or which might be made? The rent which a tenant would be prepared to give would obviously depend upon the profits to be anticipated.

It was further argued that the Legislature had only excluded an allowance for past or future and not for present profits. Why, it was asked, if all profits were to be excluded were the words "past or future" inserted? To my mind the words cover all profits whether made or to be made, and the reason for their insertion appears to me plain. If the word "profits" alone had been used it would have been open to contention that only profits actually made were referred to, and that the provision did not exclude an allowance for profits to be anticipated in the future.

Reading the enactment as a whole, I can find no indication, but quite the contrary, that the arbitrator in determining the then value of the tramway was to take into account those rights and powers which had been possessed by the promoters as such by virtue of the statute and which would be thereafter by the same statute conferred upon the local authority.

Reliance was placed by the appellants upon the provision of sects. 41 and 42 of the Tramways Act, 1870, enabling the Board of Trade, if the promoters discontinued the working of their tramway or were insolvent, to declare that their powers in respect of the tramway should be at an end. In the first of these cases the Board of Trade were empowered to declare the powers of the promoters at an end from the date of the order, in the latter, at the expiration of six months from the making of the order, but in both cases it is provided that the powers of the promoters shall thereupon cease and determine "unless the same are purchased by the local authority in manner by this Act provided." Inasmuch as sect. 43 applies to a purchase by the local authority within three months after any order made by the Board of Trade under either of the two preceding sections, it was contended that this shewed that the purchase of the undertaking was regarded by the Legislature as a purchase of the powers of the promoters.

My Lords, I do not think it possible to give the effect contended for to this argument, and to construe the word "tramway" in that part of sect. 43 which regulates the terms of payment in a different manner to that which a consideration of the section itself suggests on account of the language employed in the two preceding sections. That language is certainly not very felicitous. Whether the undertaking is purchased or not the powers of the promoters equally cease and determine: the purchase does not keep their statutory powers alive. The powers are possessed thereafter by the local authority by virtue of the statute in precisely the same manner as they were acquired by the promoters.

For these reasons I think the interlocutors appealed from should be affirmed and the appeal dismissed with costs.

LORD WATSON :—

My Lords, these appeals—the one Scotch and the other English—were heard together at your Lordships' bar. They appear to me to raise precisely the same question, under circumstances which differ in no material respect. The majority of the learned judges in both countries have come to the same conclusion. In Scotland the majority consisted of the Lord Ordinary, with three

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judges of the First Division, the Lord President dissenting. In England, the decision of a Divisional Court was unanimously reversed by three judges sitting in the Court of Appeal.

The respondents are local authorities, who have exercised their statutory option of requiring the appellants, who are street tramway companies, to sell a section of their tramway undertaking on the terms and conditions prescribed by statute. In that event, it is enacted that the price payable to the appellants shall be the value, to be ascertained failing agreement by arbitration, of certain enumerated subjects, comprised in that part of their undertaking which has been taken over by the local authority.

In both appeals the rights of the parties are regulated by the Tramways Act, 1870. Sect. 43 of that Act defines the consideration payable to be "the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters, suitable to and used by them for the purposes of their undertaking within such district." In the second, the provisions of the London Street Tramways Act, which became law on the day after the general statute, and by which the respondent company were incorporated, are also applicable. Sect. 44 of the later Act defines the consideration to which, in the event which has occurred, the company are entitled, in terms identical with those which I have just quoted from the general statute.

The parties having failed to agree as to the quantum of consideration, applied to the Board of Trade, who, in the first case, nominated Mr. Henry Tennant, and, in the second, Sir Frederick Bramwell, to be statutory referee. These gentlemen issued their respective awards; and the judicial proceedings in which these appeals are taken, though differing considerably in form, were instituted by the tramway companies with the same object, viz., in order to have the awards set aside, or corrected, in so far as objectionable. In so far as concerns the valuation of their lands, buildings, works, materials, and plant, the appellants have stated no objection. Their impeachment of the awards is rested solely upon the ground that the referees have failed to give due effect to the enactments of the statutes of 1870 in valuing the particular subject therein described as "the tramway."

It is plain that the expression "the tramway," as it occurs in the clauses already referred to, cannot mean the undertaking of the company, because it is enumerated as one of those parts of the undertaking which are to be separately valued, the sum of the values being the measure of the consideration which the company is to receive. Accordingly, it was not disputed in argument that the words must refer to the structure of stone and iron, or other material, which is affixed to the solum of the streets, and upon which tramway vehicles run. So far, the parties are agreed as to the identity of the subject to be valued; but the important question remains, upon what footing it ought to be valued; and upon that point the present controversy turns. I do not regard the question thus raised as one which merely concerns the method of valuation which ought to be followed. In my opinion, its solution depends, not upon so-called principles of valuation, meaning thereby the various formulæ, some of them alternative, according to which value may be calculated, but upon the nature and extent of the interest which the Legislature intended should attach to and accompany the structure to be valued and paid for, under the description of "the tramway."

So far as I can judge, the right of property in a tramway line, as such, may be of three different degrees. It may be no higher than bare ownership of the materials of which the line is composed, without any one having the right to retain or use them in situ. Again, it may be that the property of the line does not carry with it the privilege of future user, but that others than the owner selling may either possess or be in a position to acquire such privilege. Or, it may be, that the right to use the line for tramway purposes, in perpetuity or for a time limited, is inherent in the right of property. Although physically the subject is the same, the interest in it, which must be regarded as the true subject of valuation, is very different in these three cases.

The referees have dealt with "the tramway" as a subject belonging to the second of these classes; and they have accordingly put upon it what may conveniently be termed a construction value. The rule which he followed is thus stated by Mr. Tennant, "that the proper value of the said tramways to be determined by me, according to my construction of the statute, is such sum as it would cost to construct and establish the same, under deduction of a proper sum in respect of depreciation to their present condition, and that, in estimating such cost, I am entitled to take into account the fact that said tramways are now successfully constructed and in complete working condition." Sir Frederick Bramwell came to practically the same conclusion. He declined to give any effect to evidence led by the company for the purpose of shewing "the rental value of the purchased tramways considered as let or capable of being let," whilst he received, and took into account, evidence adduced on behalf of the County Council tending to shew "the proper cost of construction of the purchased tramways, and the depreciation of such value, by comparing the condition at the time of sale and purchase with the condition when newly constructed." He refused to admit evidence as to the profit arising from previous use of the tramways; and arrived at his valuation on the basis of cost less depreciation, such valuation to be increased by the sum of £9442, in the event of its being judicially determined that no deduction from the original cost ought to be made in respect of depreciation.

The view maintained by the appellant companies in opposition to that which has been taken by the referees is fully disclosed in their pleadings. In the first appeal, the company crave declarator to the effect that the referee is bound to value the lines of tramway purchased by the local authority according to their rental value, and that by capitalizing, at so many years' purchase as he may think proper, the rent at which, one year with another, such lines might, in their actual state, be reasonably expected to let, or by giving effect to such rental value in such other manner as he may find and determine to be just. In the second appeal, the notice of motion given by the company to set aside or refer back the award is rested upon these grounds: (1.) That the referee ought to have taken into consideration the evidence which they submitted as to the rental value of the tramways, and ought not to have excluded the evidence which they tendered as to the profits which they had derived from traffic thereon; and (2.) that the evidence given on behalf of the local authority with regard to the cost of construction, either with or without depreciation, ought not to have been considered by him.

If, according to its just construction, the expression "the tramway," as it is used in sect. 43 of the general, and sect. 44 of the London Tramways Act of 1870, was meant to designate the lines of tramway considered simply as structures and apart from any privilege of user, it would not seem to be doubtful that the awards complained of are in strict conformity with the intendment of these clauses. On the other hand, if the expression, when rightly construed, includes not merely the fabric of the tramway lines, but an exclusive right to use them for tramway traffic in the future, then neither award has exhausted the reference, because it leaves unvalued an important item, which, upon that construction, the Legislature has appointed to be valued and paid for.

Which of these constructions ought to prevail is, to my mind, the only point which your Lordships require to decide. I see no reason to doubt that these words, "the tramway," are capable of being so employed as to indicate that they embrace the use and occupation of the fabric, as well as the fabric itself, or even to indicate that they apply to the whole stock and goodwill of a tramway undertaking. But, in their primary and natural sense, the words appear to me to denote nothing more than the fabric of the tramway lines upon which traffic is conducted. In order to give them a wider meaning as they occur in the enumeration of particulars to be valued under sect. 43, I think it is incumbent upon the appellants to shew, by reference to their context or to the general scheme of the statute, that they were intended by the Legislature to have that wider significance.

The exclusive occupation and use of any portion of a public street or highway, whether by an individual or a company, is, at common law, an invasion of the rights of the public. Accordingly, an exclusive privilege of using rails laid along a street for tramway traffic cannot exist without statutory sanction, and when a right of that kind has been created its extent and its duration

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must be wholly dependent upon the terms of the authority given by the Legislature. In the present case, the right of exclusive user, as against the general public, is not one of the subjects which the appellant companies were authorized to acquire, either by agreement or by compulsion, for the purposes of their undertaking. The privilege of user is conferred upon them by sect. 34 of the Tramways Act, 1870; and they have, in my opinion, no right whatever against the public beyond what is given them by that clause.

Sect. 34 provides that "the promoters of tramways authorized by special Act and their lessees" may use carriages with flange wheels, or wheels suitable only to run on the rail prescribed by such Act. It then goes on to enact that, "subject to the provisions of such special Act, and of this Act, the promoters and their lessees shall have the exclusive use of their tramways for carriages with flange wheels, or other wheels suitable to run only on the prescribed rail." It is not a consideration to be overlooked, that the Act deals separately with the privilege of exclusive use, which is given directly to "the promoters and their lessees." But the appellant companies are not the only promoters to whom the gift is made, and they can have no lessees. Local authorities becoming purchasers under sects. 41, 42, and 43 are also "promoters" within the meaning of sect. 34. They are the only promoters who have power to let the tramway; and they are by sect. 19 expressly debarred from working the undertaking, except through a lessee. In my opinion, the plain import of the enactments of sect. 34 is to give the promoters who construct the tramway an exclusive right to use it, which is strictly personal, and is, therefore, incapable of being communicated by them to any other person; and also to give the same exclusive right to local authorities who acquire the tramway, with the additional power of communicating the privilege to their lessees.

The appellants maintained that the provisions of sects. 41, 42, and 44 qualify the enactments of sect. 34, and shew the intention of the Legislature to have been that the appellant companies' right of user should not be treated as a privilege personal to them, but as a continuing asset, which they could dispose of to the local authority. For reasons which I shall presently state, I do not think the provisions or sect. 44 have any bearing upon the point. Sect. 41 deals with the case of the promoters discontinuing to work their tramway, and sect. 42 with the case of their becoming insolvent, so that they are unable to maintain and work their tramway with advantage to the public. In either of these events the Board of Trade are authorized to declare that "the powers of the promoters" shall cease and determine, unless the same are purchased by the local authority "in manner by this Act provided," which admittedly means on the same terms as to price which are prescribed by sect. 43. It was said by the appellants to be matter of necessary inference from these provisions that "the powers of the promoters," to be purchased by the local authority in the events contemplated, must of necessity include the promoters' privilege of exclusive use. With the majority of your Lordships, I have been unable to appreciate the force of that reasoning. I cannot understand why the powers to be so purchased ought, upon any sound canon of construction, to be read as necessarily including a power or privilege previously given to the promoters in such terms that it was not theirs to sell.

As already indicated, the provisions of sect. 44 are, in my opinion, of no relevancy to the construction of the terms of sale and purchase prescribed by sect. 43. Sect. 44 empowers the original promoters, after they have used their tramway for traffic for a period of six months, to sell their undertaking, with consent of the Board of Trade, to any person, persons, corporation or company, or to the local authority of the district. If the transaction be not with the local authority, the purchaser comes into the shoes of the seller, and is affected by the provisions of sects. 41, 42, and 43. But in no case of sale and purchase under sect. 44 do the provisions of sect. 43 with respect to price apply. The parties selling and purchasing are left at liberty to adjust the terms of the transaction according to their own pleasure. The promoters may fix their own price, and decline to accept any other consideration.

I do not suggest that the inference which I derive from the other clauses of the Act, with respect to the personal character of the right of user possessed by the appellant companies, must necessarily govern the interpretation of "the tramway" in sect. 43. But I think the inference is sufficient to exclude any presumption that the Legislature intended local authorities to purchase and pay for, as inherent in the subject described as "the tramway," a right of future use which did not belong to the sellers, and had already been vested in the purchasers themselves by an express statutory grant.

I shall now advert to the terms of sect. 43, upon which these appeals really depend. It authorizes local authorities, after a certain lapse of time and upon certain conditions which have been duly observed by the respondents, to require the promoters "to sell, and thereupon such promoters shall sell to them their undertaking," or such part thereof as is within the district of the authority making the requisition. The word "undertaking" is not defined in the Act; but it appears to me that it must signify all the real and movable property belonging to the promoters necessary for conducting tramway traffic, together with all rights and interests in or connected with such property which belong to the promoters, and are capable of being transmitted from them to the purchaser. I do not think the word can be reasonably construed so as to include any property, or any right or interest, which does not belong to the promoters, and does not pass from them to their purchaser under the compulsory contract of sale. On the assumption that the promoters' privilege of use is personal, and therefore limited to the period during which they may continue to be owners of the tramway, the privilege of use after the expiry of that period, which they did not possess, cannot be regarded as part of the undertaking which they are required to sell.

I need not repeat the language which is used in sect. 43 to prescribe the consideration to be paid by the local authority to the promoters for the sale of their undertaking. The parenthetical words are so introduced as to apply to and qualify the value to be put upon each and all of the particular subjects enumerated. No question has been raised with respect to allowance for compulsory sale or other similar consideration; but the able arguments addressed to us were largely directed to the import and effect of the first part of the parenthesis, "exclusive of any allowance for past or future profits of the undertaking." I understood the appellants to concede that these words are not to be wholly disregarded in estimating the value of the tramway; and, in my opinion, the concession was inevitable. It was urged on their behalf that the making of an allowance for present or future profits, in estimating the value of a tramway line, is something quite different from ascertaining its rental value on the footing of its being a lettable subject, and, consequently, that whilst the first of these things was expressly forbidden, the second was impliedly sanctioned by the clause in question. In the course of the argument an ingenious suggestion was made to the effect that, whilst past and future are, present profits are not, excluded from the consideration of the referee. What can possibly constitute present profits, referable to a mere punctum temporis, and distinguished from past and future profits, was not explained in argument, and is a problem which I am unable to solve to my own satisfaction. I see no reason to doubt that the words occurring in the parenthesis were meant to be, and are equivalent to, "any profits whether past or future."

The prohibition of any allowance for past or future profits does not appear to me to be compatible with the adoption of rental value, for which the appellants contend. It is in substance an enactment that the profits which the tramway has earned, or may be capable of earning, are not to be taken into account at all in estimating the amount which is to be paid by the local authority. It may be true that there are some heritable subjects upon which a rental value can be put without minute investigation of their capability of yielding pecuniary profits. The yearly value of a dwelling-house in a particular street may be approximately ascertained by reference to the average of the rents actually paid for similar tenements in the same street, and without entering into an inquiry whether its occupation has been or will be a source of profit to the occupant. But it is a mistake to suppose that valuation by rental is a process dissociated from the idea of profit. On the contrary, it is simply one of several methods used for the purpose of arriving at an estimate of the profits arising from the ownership of heritable estate. It is not a satisfactory method in the case of a tramway

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line which has never been let, and has no competing line within its district. The questions whether a hypothetical tenant could be found, and what rent he might be reasonably expected to give if he were found, cannot be easily solved, if at all, except by estimating what amount of profit the line had yielded in the past, and was likely to yield in the future. An intending lessee, whether real or hypothetical, would hesitate to pay a rent which was not based upon these data. Again, I can well understand that future profits might be assumed as an element in ascertaining rental value, and yet that, in a compulsory sale, they might afford grounds for a further allowance in respect of the seller's loss of profit arising from disturbance of his business. But the case of past profits is very different. When past profits have been taken into account, as enhancing rental value, I am at a loss to understand upon what possible grounds they could be regarded as entitling the seller to any further allowance. I am unconscious of doing injustice to the opinions of the learned judges from whom I differ when I say that not one of them has suggested in what shape such further allowance could be made.

These considerations all tend to confirm the inference which I draw from the language of sect. 43, as well as from the other provisions of the Act to which allusion has been made, that inference being that the Legislature, by the expression "the tramway," meant to denote the bare fabric of its lines, unaccompanied by an exclusive privilege of using them. I therefore concur in the judgments which have been moved by the Lord Chancellor.

LORD ASHBOURNE :—

My Lords, the facts of the case have been so fully stated by the Lord Chancellor that I need only refer to them at such length as may make my meaning plain.

The direct question raised before your Lordships is whether the arbitrator was right in valuing the tramway at what it would cost to make, or whether he ought to have ascertained what it could have been let for to a tenant who could use it, and then have capitalized its annual value.

The cases of the Edinburgh Street Tramways Company and of the London Street Tramways Company have been argued together, as they depend upon precisely the same point. The question in the *Edinburgh Case* (1) depends upon the construction of sect. 43 of the General Tramways Act, 1870, and the *London Case* (2) depends upon sect. 44 of the London Street Tramways Act; but the two sections are in identical terms, as is the case with many other sections of these Acts. For convenience I shall refer only to the sections of the General Tramways Act, 1870, and shall not deem it necessary to note specially the corresponding sections of the London Street Tramways Act of 1870, which are mentioned in detail in the judgments in the *London Case* (2). The decision is of deep moment to all the tramway companies of Great Britain, and involves interests of considerable magnitude.

The section is not clear. In any view of the case, it is a cumbrous and unfortunate piece of drafting—not plain or direct—and each side is confronted with difficulties in its interpretation. It is not surprising to find that amongst the judges before whom the case has come there have been wide differences of opinion; and therefore I have applied myself to the consideration of the case with many doubts and misgivings as to the soundness of my own judgment on important points, where, though I might be supported by the opinions of judges of eminence, I know my conclusions have been opposed to authorities for whom I entertain the very highest respect.

The clause requires the closest and most critical examination and analysis, in order to see what is the method of the transfer, what is sold, and what is to be paid.

What is the method? As Mathew, J., in the *London Case* (2) has forcibly said, "Nothing would have been easier than to have said in terms that at the end of the twenty-one years there shall be a transfer of the undertaking, and the company shall be paid for the cost of materials in situ capable of being worked, less depreciation." But the Legislature in its wisdom has used a long, complicated, and involved sentence, from which we have to spell out and infer such meanings as we can. The transaction is

(1) 21 Ct. Sess. Cas. 4th Series (Rettie), 688.
(2) [1894] 2 Q. B. 189, at p. 197.

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to take place by a sale. A sale involves a selling and buying, a bargaining, and here an arbitration. If what was meant was a statutable transfer at a statutable price, it was certainly not felicitous drafting to enact that the transaction should be carried out by the machinery set out at such length in the section.

But a far more important consideration in the matter is what is sold and transferred under the section. The undertaking, of course, is sold; but the great difficulty is to give the due and proper meaning to the word "tramway." Is it only the tramway in situ, or the tramway with the power to use it? This is really a governing point in the case. Does the sale of the tramway include or involve or carry with it the right to use it? The words of the section are, "When any such sale has been made, all the rights, powers, and authorities of the company in respect of the undertaking sold . . . shall vest" in the purchaser. The words here, again, are not the best or the clearest. They must be read not only with the rest of the section, but also in connection with other sections, in order to see whether the right to the tramway is treated in the Act as carrying with it the right to use the tramway. Sect. 41 deals with the discontinuance of tramways, and enacts that in certain cases the Board of Trade may by order declare that from the date of the order the powers of the promoters shall be at an end, "and the said powers of the promoters shall cease and determine, unless the same are purchased by the local authority in manner by this Act provided," i.e. by sect. 43. Thus sect. 41 expressly states that the powers —including the right to use—are purchased under sect. 43. Sect. 42 is to the like effect. It deals with the insolvency of promoters, and provides for the ceasing of their powers "unless the same are purchased by the local authority in manner by this Act provided," i.e. again by sect. 43. In this connection it is important to note sect. 44, which enacts: "Where any tramway in any district has been opened for traffic for a period of six months, the promoters may, with the consent of the Board of Trade, sell their undertaking to any person, corporation, or company, or to the local authority of such district; and when any such sale has been made, all the rights, powers, authorities, obligations, and liabilities of such promoters in respect to the undertaking sold shall be transferred to, vested in, and may be exercised by, and shall attach to the person, corporation, company, or local authority to whom the same has been sold, in like manner as if such tramway was constructed by such person, corporation, company, or local authority under the powers conferred upon them by special Act, and in reference to the same they shall be deemed to be the promoters." In my opinion a sale under sect. 44 would carry with it the right to use the tramway. Similar words are used in sect. 43; the machinery of sale is resorted to, "the rights, powers, and authorities" are also transferred, and I cannot resist the conclusion that under both sections the buyer was intended to purchase and acquire with the tramway the right to use it.

It was argued before your Lordships that the powers were to be regarded as the creatures of the statute, given independently by its provisions to "the promoters," and that the sale had nothing to say to them, and did not carry, affect, or transfer them. I do not find any such idea in the judgments of the Court of Appeal in the *London Case.* Lindley, L.J., says (1): "The vendors have only a right of user (that is, by sect. 20); they have no land to sell; they have only an easement so far as the land is concerned; but they have an exclusive right to use the tramway (by sect. 29), and to grant licences to other persons to use it (by sect. 37). These rights will be enjoyed by the purchasers, and these rights must be borne in mind in ascertaining the value of the tramway. These rights exclude any valuation of the tramway as so much old iron to be broken up and removed. The tramway must be valued as an existing tramway, used as such by the vendors before the sale, and to be used as such by the purchasers after the sale." The words of A. L. Smith, L.J., on this point are very strong and clear (2): "I cannot doubt that what is to be sold and bought is not merely the tramway in situ as a structure, but the undertaking of the company as a going, toll-earning concern; that is to say, the tramway as then in use, with the rights, powers, and authorities of the company to maintain it in the public streets, run cars thereon with flange wheels to the exclusion of all others; to take the prescribed tolls for so doing, and to exercise the other powers contained in the Act. Of this I have no doubt; the words of the section are clear, 'And thereupon the company shall sell,' not their rails and sleepers, but 'their undertaking,' and 'when such sale has been made, all the rights, powers, and authorities of the company in respect to the undertaking are to vest in the County Council." A. L. Smith, L.J., in the clearest words, gave his opinion that the company had to sell "the powers granted to the company of running cars with flange wheels thereon to the exclusion of all others, and of taking the prescribed tolls and the other powers in the Act mentioned"; and he adds emphatically, "that this is what is to be sold by the company to the London County Council, I do not doubt." I concur in this view of A. L. Smith, L.J., which I regard as of the highest importance, as stating and explaining the great value of the subject-matter to be sold.

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(1) [1894] 2 Q. B. at p. 205.

(2) [1894] 2 Q. B. at pp. 214, 219.

It may be that the language of the section is involved and roundabout, that the conveyancing is defective; but, to my mind, it is much more in accordance with the language of all the sections of the Act to hold the conclusion I have indicated, than to spell out a narrower one in contradiction to what I believe to be the meaning of sect. 43 itself, as well as to the clear words of sects. 41 and 42, and the construction required to give effect to sect. 44.

If, then, the undertaking sold comprised or included a tramway capable of being used and with a right to use it, the next great question is, What is the price to be paid for it under the section? The section answers (leaving out the parenthesis for the present), "the then value of the tramway, and all lands, buildings, works, materials, and plant."

The actual tramway, in a very literal sense, consists of little else except its iron rails. "The then value of the tramway" from the old iron point of view would be a ludicrous mockery; and, accordingly, every one—judges and arbitrators alike—repudiate any such construction, and admit that a wider interpretation must be sought. A. L. Smith, L.J., says: "There can be no doubt that in any ordinary case, where an undertaking such as the present is to be sold and paid for, its present—that is, its then value—is in practice arrived at by capitalizing its rental value."

Mathew, J. (1), more in detail, says: "Value is to be ascertained as it would have to be ascertained for rating purposes," and, therefore, you must construe the word in that sense. "These tramways are hereditaments capable of earning profits and assessable under the Poor Law Acts. That is clear from the *Pimlico Case* (2), and the meaning which I have indicated of the word 'value' is recognised in many statutes in pari materiâ; as, for instance, in the Valuation (Metropolis) Act of 1869, and also in the Union Assessment Acts. To get at the value of the hereditament, you take the profits, deduct the tenant's charges and reasonable profits, and what is left is the rent which would be paid by a tenant for the opportunity of earning his profit. By capitalizing that rental you arrive at the value of the hereditament." I, therefore, take it that, apart from the parenthesis, "the then value" would be held to have its ordinary meaning, as stated by A. L. Smith, L.J.

The onus of proving that the ordinary meaning should not be given to the words "the then value" is cast upon those who deny it, and the respondents insist that for this purpose they are entitled to rely upon the parenthesis, which says, "exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other considerations whatsoever." Primâ facie, these words imply that, but for their use, the thing excluded would have been included. An exception, a parenthesis, an exclusion, under ordinary circumstances, would be held to qualify and lessen the generality of preceding words. Here, according to the contention, they are used, not to abate, but to destroy and contradict the ordinary meaning of the words "the then value." If the argument is correct, that the value of the tramway is only the value of the materials in situ, profits would not need to be excluded, because not comprised in the original subject-matter.

It is admitted that "the then value" is not to be found in the value of old iron; it is admitted that something very much more is to be assessed. Where is the line to be drawn? A. L. Smith, L.J., well puts the question, "Are the words of exclusion in this section so strong, when applied to the things to be paid for,

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(1) [1894] 2 Q. B. at p. 194.

(2) Law Rep. 9 Q. B. 9.

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namely, a tramway in situ, as to exclude the ordinary way of ascertaining present value?"

It must be borne in mind that the County Council can only acquire ownership rights under the sale. They can let, but cannot themselves use, occupy, or work the tramway. They are debarred from making occupiers' profits; and, therefore, it is most reasonable to provide that no allowance should be made for them in the sale. It is most fair that in a sale to a public authority "the then value," should not be run up by the history of "past" or the anticipation of "future" profits. These words "past or future" are suggested by the word "then." The provision is that no "allowance" is to be made, and that is very far from an enactment that "the then value" may not be ascertained according to the ordinary rule and practice in like cases. The argument of the respondents concentrates attention exclusively upon the parenthesis, and ignores and belittles everything in the section which would explain its terms. The Lord President in his judgment well says (1): "The contention of the corporation seems to me exposed to the grave objection that it allows words having a subordinate and qualifying position to kill the plain import of the main proposition to which they relate, and does so by ascribing to those words more meaning than, primâ facie, they bear. I cannot conceive why the Legislature should describe the transaction as a sale, and say the terms are to be the payment of the existing value of the tramway, &c., and then, incidentally and by way of exclusion, put in words which make the terms inconsistent with sale and purchase, and inconsistent also with payment of existing value."

It must be remembered that "the then value" of lands and buildings has also to be measured under the same section, and it would be almost impossible to ascertain the value of land and buildings without considering what rent a tenant would pay for them. The land and buildings may have cost vast sums, and no one could suggest the reasonableness of giving less than their fair value under this provision. No "allowance" is here to be made for "past or future profits"; but "the then value" is to be arrived at by the ordinary methods.

(1) 21 Ct. Sess. Cas. 4th Series (Rettie), at p. 703.

It is also not to be forgotten that under this section a tramway company might be compelled to sell the most paying and successful part of its undertaking, retaining only the part which barely, if at all, paid its expenses. Under this section, admittedly, they could get no compensation for compulsory sale or for severance. The company concede that they, under its terms, are debarred from "any allowance" for their profits in "the past" or their hope of greater profit in "the future"; but could it have been intended that in providing they were to get "the then value," they were to get less than would come to them under the ordinary rule, and be subjected to an arbitrary standard discovered by the arbitrator?

The *Kirkleatham Case* (1) is important as shewing (to quote Henn Collins, J.) "the words which the Legislature uses when it does intend that the thing sold and the thing paid for shall be the materials, and not the right to use the materials." The section in the present case is framed in an entirely different manner, because, in my opinion, the Legislature contemplated a different operation with different results.

No question of hardship can be considered. The construction of this section is all that is before your Lordships. I venture to think that the construction suggested by the County Council is unreasonable, and that it would be natural to expect that if the Legislature contemplated such a meaning they would have said so in plain language. The weighty words of Mathew, J., are worthy of attention: "The Act of Parliament was intended to inform such of the public as were disposed to become shareholders in this kind of undertaking, and one would expect plain language addressed to such persons and their advisers as to what the Legislature meant. If Parliament meant to inform the public, 'You shall not have, at the end of twenty-one years, compensation for the value of the undertaking, but your undertaking shall be sold for the cost of the materials in situ, less depreciation,' I cannot help thinking that very few tramways would have been constructed, because a shareholder proposing to take shares has to satisfy himself that the profits of the undertaking would not only pay him interest upon his investment,

(1) [1893] A. C. 444.

but would restore to him wholly or partially, at the end of twenty-one years, his capital."

My Lords, I have already intimated the doubts which I must entertain of the soundness of my views when I recognise the high authority of those who have reached a different conclusion; but, with all deference and submission, in my opinion, the judgment appealed from should be reversed.

Lord Herschell, L.C.:—

My Lords, my noble and learned friend, Lord Shand, is unavoidably prevented from being present. He has prepared a judgment which he desires should be read to the House.

The following judgment was then read by Lord Watson:—

Lord Shand:—

My Lords, the two appeals of the Edinburgh Street Tramways Company against the Magistrates and Town Council of the City of Edinburgh and the London Street Tramways Company against the London County Council, involve the decision of the same question; and the arguments of counsel in both cases have been presented on that footing. That question depends on the true meaning and effect of sect. 43 of the General Tramways Act of 1870, which is incorporated in the special Acts of the Edinburgh Streets Tramways Company, and which is substantially in its terms embodied in the London Street Tramways Act, s. 44.

The Magistrates and Council of Edinburgh and the London County Council have respectively availed themselves of their statutory powers to acquire portions of the tramway systems belonging to the appellants respectively, having served notices requiring these companies to sell parts of their respective undertakings on the terms prescribed by the provisions of the statutes above mentioned. In order correctly to define these terms, as to which the parties so widely differ, it appears to me to be of importance to ascertain, in the first place, what are the rights or powers belonging to the appellants under their statutes, and whether or how far they are enabled to transfer these rights and powers to the local authorities as purchasers of their respective undertakings.

The promoters were authorized to lay down their tramway lines or rails on the public streets without making any payment or compensation for the ground so occupied to the local authority or other corporation or body in whom the right to the solum of the streets might be vested. The tramway companies, however, acquired no right of property, but a right of user only—viz., the right of exclusive use of their tramways for carriages with flange-wheels or other wheels suitable only to run on the prescribed rail. And the right acquired was not in perpetuity, for at the end of twenty-one years, and of every succeeding period of seven years, the promoters might be required by the local authority to sell their undertaking on the terms specified in sect. 43 of the general Tramways Act of 1870, while the same result might follow within a shorter period than twenty-one years under sects. 41 and 42 of the statute, in consequence of the discontinuance of the promoters to work the tramways, or the insolvency of the promoters, followed by an order of the Board of Trade, and a notice to purchase given with consent of the Board of Trade by the local authority.

The Edinburgh Tramways Company could not assign their rights, which were given to them only, and not to assignees; and though by sect. 46 of the London Tramways Act there was given a power of sale of the undertaking with consent of the Board of Trade, this was subject to the company's obligations and liabilities, one of which was the obligation to sell the undertaking to the local authority, after the lapse of twenty-one years, on the terms specified in sect. 44 of the company's Act.

Having regard, on the one hand, to the privilege given to the promoters of laying their tramways on the public streets without making compensation for the ground occupied, and, on the other, to the limited rights conferred—limited as to time, in the option of the local authority, and limited also as to extent, the right of user only being conferred—it might reasonably be expected that, should the local authority (who, it may be presumed, have themselves a right of property or other direct interest in the solum of

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the streets) desire after the lapse of twenty-one years to avail themselves of the statutory power conferred on them to acquire the tramway system or a part of it, they should be enabled to do so on terms which would have relation to the peculiar nature of the promoters' rights, and the privilege which the promoters had obtained to occupy and use the public streets without payment. Accordingly, reading sect. 43 in the light of these considerations, I have come to be of the opinion expressed by the large majority of the learned judges who have considered the question in the two cases under review, and as I concur in the reasons which have been already stated by the Lord Chancellor, and by my noble and learned friend Lord Watson, I shall content myself with making very few additional observations.

The promoters are required to sell their "undertaking," or so much of the same as is within a defined district, and for that undertaking the local authority are required to pay. The clause proceeds, however, to say that the sale is to be made "upon terms" of payment, followed by a specification which expressly excludes certain elements or items from consideration, and expressly enumerates others, for which payment is to be made. The undertaking is to be sold "upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials and plant of the promoters suitable to and used by them for the purposes of their undertaking." In my opinion, the defined terms of payment for the undertaking does not include a capitalized rental of the tramway system as contended for by the appellants.

It must be observed that the promoters, unless in default from having ceased to work the tramways with advantage to the public, have the full benefit of twenty-one years' enjoyment of the exclusive user which the statute on very advantageous terms confers on them; but the notice by the local authority determines the right of the promoters to any continuance of that right of user, which is the sole right they have. Excepting under sect. 43, the promoters had no right to sell their undertaking.

They have no power to assign their rights. The interest which belongs to the promoters, and may be transmitted or transferred by them, does not include a right either of property, such as a railway company has in the line which it owns, or even of user by the promoters, for that right was personal and in effect temporary, being subject to determination by a notice which has been given. It includes only, therefore, their tramway as laid upon the ground, and the houses, plant, and other property enumerated in sect. 43, used in connection with the working of it, and of which they are proprietors. It is true that the local authority by the purchase acquires a more extensive right—a right of a permanent nature. This might follow, as it appears to me, because of the direct right of property, or other direct interest, which the local authority has in the streets, and because having once acquired the undertaking the local authority is under no obligation thereafter to sell it, as the promoters were. The permanent right thus acquired is not, however, conferred by the promoters, or acquired from them, but is conferred by the special provision of the statute in sect. 43, which declares that "when any such sale has been made" all the rights of the promoters in respect of the undertaking sold shall be transferred to the local authority "in like manner as if such tramway was constructed by such authority under the powers conferred upon them by a provisional order under this Act, and in reference to the same shall be deemed to be the promoters."

These considerations appear to me to have a very material bearing on the meaning to be attached to the very specific terms of payment expressed in sect. 43 of the statute, and to exclude the contention that the value of the undertaking was to include a capitalized rental, or an estimate founded on profits, or any of the other items included in the parenthetical clause, viz. "(any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever)." I think the terms of the section used were inserted with the purpose of making it clear that the company was to be paid the value of the property it possessed in the tramway and in connection with the working of the tramway, and for that property only, but not for rights which they could not assign, and which they could only exercise for a defined period, and which were thereafter determinable on notice by the local authority. I agree with the learned judges who have held that an allowance given as an estimate of rental past or future would be in truth an allowance for profits of the undertaking past or future, and that this is excluded by the statute; and I am further of opinion that the enumeration of subjects for the value of which payment is to be made—"the tramway and all lands, buildings, works, materials, and plant of the promoters"—includes exhaustively all that is to be paid for, and does not include any sum as for estimated rental value or estimated profits. The word "tramway" throughout the statutory provisions by which the appellants acquired their rights is used as meaning the tramway lines or structure laid down. It is, in my judgment, used in the same sense in sect. 43, and does not include rental value of a subject which had been held in effect under a temporary right of user which came to an end by the notice to purchase.

It has been said that if the Legislature intended to deprive the sellers of any estimate or allowance for such return as a tenant might give for the use of the tramway system, this would have been expressed in terms more clear—in some such terms as are suggested by Mathew, J., in his very able opinion. There is no doubt that the language used has left room for great discussion and great diversity of opinion. But there is an enumeration of the subjects for which payment is to be made which does not include profits of any kind, and an exclusion of items by language which does mention profits, and is otherwise of a very comprehensive kind—an exclusion of "any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever." It seems to me that these general and comprehensive words are at all events so clear that, if it had been intended to give the appellants what they now ask, the words "or other consideration whatsoever" would certainly have been qualified by such words of exception as "excepting an allowance for such return or rental as a tenant might give for the use of the undertaking."

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On these grounds I am also of opinion that the appeals in both cases should be dismissed.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 30th July, 1894.

Agents for appellants: *Rees & Frere, for Drummond & Reid, S.S.C., Edinburgh.*

Agent for respondents: *Andrew Beveridge, for Wm. White Millar, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

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July 30.

THE LONDON STREET TRAMWAYS COMPANY . . . . APPELLANTS;

AND

THE LONDON COUNTY COUNCIL . . RESPONDENTS.

Tramway—Purchase of Undertaking by County Council—Terms of Purchase—Valuation of Tramway—London Street Tramways Act 1870 (33 & 34 *Vict. c. clxxi.*) *s.* 44.

Sect. 44 of the London Street Tramways Act 1870 (33 & 34 Vict. c. clxxi.) enacts that the Metropolitan Board of Works may after twenty-one years from the passing of the Act require the London Street Tramways Company to sell to them their undertaking upon terms identical with those prescribed by s. 43 of the Tramways Act 1870 (33 & 34 Vict. c. 78), viz. "upon the terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, material and plant of the company suitable to and used by them for the purposes of their undertaking." The London County Council, as successors to the Metropolitan Board of Works, required the company to sell:—

Held, Lord Ashbourne dissenting, that the word "tramway" meant the structure laid down and nothing more and did not include the statutory powers conferred on the company; and that the arbitrator was right in rejecting all evidence of past and future profits, including evidence of the rental value of the tramways considered as let or capable of being let to a tenant, and in awarding that "the then value of the tramway and all lands, buildings, works" &c. must be measured by what it would cost to establish the tramway if it did not then exist, subject to a proper deduction in respect of depreciation.

The decision of the Court of Appeal ([1894] 2 Q. B. 189) affirmed.

APPEAL from an order of the Court of Appeal (1).

Under the powers given by the London Street Tramways Act 1870 (33 & 34 Vict. c. clxxi.) the appellants made and maintained street tramways in London.

Sect. 44 of the Act enacts that "The Metropolitan Board of Works may . . . within six months after the expiration of a period of twenty-one years from the passing of this Act . . . with the approval of the Board of Trade, by notice in writing require the company to sell, and thereupon the company shall sell to them their undertaking, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, material and plant of the company suitable to and used by them for the purposes of their undertaking, such value to be, in case of difference, determined by an engineer or other fit person nominated as referee by the Board of Trade . . . and when any such sale has been made, all the rights, powers, and authorities of the company in respect to the undertaking sold . . . shall be transferred to, vested in, and may be exercised by the Metropolitan Board of Works in like manner as if that board had been authorized by this Act to construct the tramways, and had been named in this Act instead of the company."

In 1891 the respondents (to whom the powers of the Metropolitan Board of Works were transferred by the Local Government Act, 1888, s. 40) gave notice to the appellants requiring them to sell their tramways.

The arbitrator (Sir F. Bramwell) appointed by the Board of Trade made his award, by which, after reciting that he had rejected all evidence of past or future profits (2), including evidence of the rental value of the tramways considered as let or capable of being let to a tenant, he awarded "that the sum of £64,540 is the value of the purchased tramways and the works thereof, exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory purchase, or other consideration whatever, except the consideration of the value to the tramways company or to the County Council measured by what it would cost either the tramways company or the County Council to establish the purchased tramways if such tramways did not now exist, but taking into account a proper deduction in respect of depreciation.

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(1) [1894] 2 Q. B. 189.

(2) The recitals are set out in the report of the case in the Courts below, [1894] 2 Q. B. 189.

"And that the value of the purchased tramways and of all lands, buildings, works, materials and plant of the tramways company suitable to and used by them for the purposes of the undertaking is the sum of £64,540, and that such sum forms the 'then value' of the premises within the meaning of the 44th section of the London Street Tramways Act, 1870."

The appellants moved the Queen's Bench Division that the award be referred back to the arbitrator on the grounds—

(1.) That the arbitrator ought to have taken into consideration the evidence given on behalf of the company as to the rental value of the tramways, considered as let, or as capable of being let to a tenant.

(2.) That the arbitrator was wrong in excluding evidence of the profits made by the company from the traffic on the tramways.

(3.) That the evidence given on behalf of the London County Council of the cost of construction of the tramways, either with or without depreciation, was inadmissible for the purpose of ascertaining the value of the tramways according to the true intent and meaning of the 44th section of the London Street Tramways Act, 1870, and such evidence ought not to have been admitted or taken into consideration by the arbitrator.

The Court (Mathew and Collins JJ.) ordered that the award be remitted to the arbitrator for his re-consideration and re-determination. This decision was reversed and the order set aside by the Court of Appeal (Lindley, Kay, and A. L. Smith L.JJ.) (1).

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(1) [1894] 2 Q. B. 189.

June 12, 14, 15. Sir *R. E. Webster* Q.C. (*C. A. Cripps* Q.C. and *H. Sutton* with him) for the appellants:—

The appellants are not asking for anything in addition to the value of the tramway. This is a compulsory sale without the usual adjuncts of such a sale. The tramway company should be put in at least as good a position as a telegraph company. They are not merely the holders of a terminable concession. The user attaches to the tramway, and not to the undertaking. The local authority was to pay for the tramway and the right to use it. It was contemplated that the local authority should let the tramway at a rent. The recognised practice of the Legislature must not be forgotten. There were well-ascertained principles in 1870 applicable to cases of compulsory purchase; and the same considerations apply as under the Lands Clauses Act. The rights acquired by the local authority are defined in s. 19 of the Tramways Act, 1870, under which the local authority do not get all the company's rights. There is, for example, no right of occupation, and the local bodies are only empowered to allow others to use the tramway. The right of occupation is transferred by operation of the Act of Parliament. The company were occupiers, and to carry on that occupation the ownership was involved of tramcars, horses, plant. It necessarily follows that the rent which in the open market could be obtained for such an occupation is the measure of value. The "value of the tramway" is a term of art; and the same standard should be applied as is used for rating purposes; and that standard is what a tenant would give in rent. It is true that profits are excluded; but rent is not thereby excluded. The value must be what the tramway is worth when in a condition capable of occupation. It would be unjust even according to the strictest construction of the language to award nothing more than the cost of laying the rails minus a deduction for depreciation.

The only principle of valuation, according to the respondents, is to ascertain what it would cost to construct the tramway at present prices. But this is absurd on the face of it. If prices had risen, the purchasers would have to pay in excess of what the vendors had paid. If prices had fallen, an unfair burden of loss would be laid on the company. Structural cost is no measure

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of value. The great gate at Euston cost £20,000; but its value is practically nothing. The true test is the rent which the County Council could obtain for a lease in perpetuity.

There is a special reason why the Legislature excluded profits from consideration. The company might have paid higher profits than were justified; they might have neglected repairs, underpaid and overworked their servants; and so in effect the Legislature has declined to involve itself in these questions, and has taken the value to be that which the thing is worth if properly managed. It lies upon those who are setting up another standard to prove their contention. [He cited *Pimlico &c. Tramway Company* v. *Greenwich* (1); *Reg.* v. *London and North Western Railway Company* (2); *Dobbs* v. *Grand Junction Waterworks Company* (3), per Earl of Selborne, at p. 58; *Elston* v. *Rose* (4); *Rex* v. *Bridgewater* (5); *Rex* v. *Tomlinson* (6); *Rex* v. *Lower Mitton* (7).]

Finlay Q.C. (*G. M. Freeman* with him) for the respondents.

Sir *R. E. Webster* Q.C. in reply cited *Gardner* v. *London, Chatham and Dover Railway Company* (8).

The House took time for consideration.

July 30. After the judgments in *Edinburgh Street Tramways Company* v. *Lord Provost, &c., of Edinburgh* (9) the following judgments were delivered:—

LORD HERSCHELL L.C.:—

My Lords, I have carefully considered the distinctions pointed out between this case and that in which judgment has just been delivered; but I think, with those of your Lordships who heard the case, that there is no such difference as to lead to a different conclusion.

LORDS WATSON and SHAND concurred.

(1) Law Rep. 9 Q. B. 9.
(2) Law Rep. 9 Q. B. 134, 144.
(3) 9 App. Cas. 49.
(4) Law Rep. 4 Q. B. 4; 9 B. & S. 509.
(5) 9 B. & C. 68.
(6) 9 B. & C. 163.
(7) 9 B. & C. 810.
(8) Law Rep. 2 Ch. 201, 217.
(9) Ante, p. 456.

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Lord Ashbourne :—

My Lords, it is unnecessary for me to repeat my dissent. In fact, my judgment covered both these cases.

Order appealed from affirmed and appeal dismissed with costs.

Solicitors for appellants: *Ashurst, Morris, Crisp & Co.*
Solicitor for respondents: *W. A. Blaxland.*

[HOUSE OF LORDS.]

H. L. (E.)
1894
August 3.

SMURTHWAITE and Others . . . . Appellants;

and

HANNAY and Others . . . . . . Respondents.

Practice—Parties—Plaintiffs, Joinder of—Causes of Action—Joinder of Several Plaintiffs in respect of Separate Causes of Action—Rules of the Supreme Court, Order xvi. *r.* 1; *Order* xviii. *rr.* 1, 8.

Order xvi. r. 1 deals merely with the parties to an action, and has no reference to the joinder of several causes of action.

Bales of cotton were shipped by several shippers upon a general ship for carriage to Liverpool, the bills of lading being similar. Upon arrival it was found that the number of bales landed fell short of those shipped, and that some of the landed bales could not be identified, their marks having been obliterated. These latter bales were sold and their proceeds distributed proportionately among the several consignees. Sixteen holders of bills of lading, nine being shippers and seven consignees, joined in one action against the shipowners claiming damages for non-delivery of the number of bales specified in their bills of lading respectively :—

Held, that the causes of action of the several plaintiffs were separate and distinct, and could not be joined in one action under Orders xvi. and xviii., or otherwise.

The decision of the Court of Appeal ([1893] 2 Q. B. 412) reversed, and the decision of the Queen's Bench Division restored.

Appeal from a decision of the Court of Appeal (1).

The following statement of facts is taken from the judgment of Lord Russell of Killowen.

The respondents, the plaintiffs below, sue the appellants, the defendants below, for damages for non-delivery of certain bales

(1) [1893] 2 Q. B. 412.

of cotton shipped in the defendants' steamship *Castleton* at Galveston for carriage to Liverpool. The plaintiffs consist of sixteen firms or persons, nine of whom are alleged to have been shippers, and seven consignees of the cotton in question.

The defendants have pleaded several defences, the principal defence apparently being that the bales of cotton claimed were never shipped, or received for shipment, on board the defendants' ship.

The facts alleged in the pleadings, so far as they are material, are as follows:—

Each of the nine shippers shipped bales of cotton, in varying quantities, on board the *Castleton*, receiving separate bills of lading therefor. The facts common to all the shipments were, that the shipments consisted of bales of cotton; that they were laden on board the same ship (which was a general ship); that they were consigned to the same port, and that the bills of lading were similar in all respects material in this case.

When the ship arrived at Liverpool it was found that the total number of bales landed fell short of the total number in the bills of lading by fifteen. Further, it was found in the case of eighteen of the landed bales, that their distinctive marks and numbers had been obliterated, and that they were unidentifiable. Those eighteen bales have been sold, and it is stated that their proceeds have been distributed proportionately amongst the several consignees. In this state of things, the plaintiffs joined in bringing the present action. The defendants objected to the joinder of the plaintiffs in one action, and claimed that each plaintiff was bound to bring a separate action in respect of his shipment or consignment, as being a separate and distinct cause of action.

On the 1st of June, 1893, Mathew J. made an order at chambers refusing an application to stay the action; but, on appeal from that refusal, Day J. and Henn Collins J., on the 30th of June 1893, made an order that all further proceedings should be stayed, or the action dismissed, on the ground that the plaintiffs should have brought separate actions in respect of their respective claims, and further ordered that the plaintiffs should elect as to which claim they would proceed with.

Upon appeal had from the last-mentioned order, the Master of the Rolls and Kay L.J. (Bowen L.J. dissenting) gave judgment reversing the order of the Divisional Court, and thereby allowed the action to proceed (1). From that judgment the present appeal is brought.

June 21, 22. *Bigham* Q.C. and *Joseph Walton* Q.C. (*Pickford* Q.C. with them) for the appellants:—

The reasons for the non-delivery of the bales may have been the same in all the cases, but the circumstances necessarily differed in each case. Shipments were made at different times by different persons in different bales. The question turns on Order XVI. r. 1 and Order XVIII. r. 1. These rules are much the same as existed under the Common Law Procedure Acts. By the former rule parties may be joined as plaintiffs in whom "the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." None of these conditions apply. The rule says "the right," not "a right" or "any right." There is no common relief claimed by all the plaintiffs. Each plaintiff has a particular right in himself: nothing is claimed "jointly, severally, or in the alternative." Each plaintiff has a sole and separate right. In *Booth* v. *Briscoe* (2) the action was in respect of one libel, and that case is not similar to this. If the Court of Appeal is right, any number of plaintiffs might combine in one action any number of claims, though each had a separate claim. In *Burstall* v. *Beyfus* (3) the Earl of Selborne L.C. held in effect that the rules under the Judicature Acts only enable that to be done which in other ways might have been done under the old practice. In that case under Order XVIII. r. 1 the action was dismissed for misjoinder because the cause of action against one defendant was disconnected from that against the others, though they arose out of a common incident. In *Gort* v. *Rowney* (4) no objection was taken to the joinder of parties, and *Booth* v. *Briscoe* (2) was followed. In *Sandes* v. *Wildsmith* (5) both these cases were discussed, and it was held that Order XVI.

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(1) [1893] 2 Q. B. 412.

(2) 2 Q. B. D. 496.

(3) 26 Ch. D. 35.

(4) 17 Q. B. D. 625.

(5) [1893] 1 Q. B. 771.

r. 1 could not apply to several slanders of several plaintiffs. Lord Esher's interpretation of "severally" is wrong. It is not sought to prevent the joinder of plaintiffs, but of causes of action.

[LORD RUSSELL referred to *Appleton* v. *Chapel Town Paper Company* (1).]

There is not one transaction, but a series of different transactions. The defences might vary infinitely in each case, though one negligent act was the source of all the claims. If the order appealed from is right, the whole cause list might be consolidated into one action. The rules do not go beyond the provisions of the Common Law Procedure Acts, and the object is to enable several persons to join as plaintiffs in some if not in all of whom the right arising out of one and the same contract might reside.

Finlay Q.C. and *T. G. Carver* for the respondents:—

Order XVI. enables several plaintiffs and several causes of action to be joined, but is followed by Order XVIII. r. 8, by which the defendant may apply to the judge to restrict the action within proper limits. The rules go much beyond the Common Law Procedure Acts. No such words as "jointly, severally, or in the alternative" are to be found in the Common Law Procedure Act 1860 s. 19, which deals with the joinder of too many plaintiffs. The only limit to the power of joinder is the general power of the Court over its own process. The Court would not allow an action for breach of promise of marriage to be joined with an action on a bill of lading. But the rules modify and correct one another. When the causes of action are closely connected with one another and several trials would be but the repetition of the first, the defence being throughout the same, Order XVI. r. 1 applies. The whole evidence relating to all the transactions would have to be adduced before any of the cases could be tried. The bills of lading and the conditions are throughout identical. All that Order XVI. r. 6 does is to relieve the plaintiff from the necessity of joining all the persons liable:

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(1) 45 L. J. (Ch.) 276.

see *Devaynes* v. *Robinson* (1) on the rule of equity that all persons liable to contribute should be joined. Order XVIII. r. 6 clearly justifies this joinder—it says: "Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant." By Order XVI. rr. 3–8 very wide powers of joinder are given subject to the control of the Court. There was formerly much loss of time and increase of cost in trying different actions involving the same issue. *Booth* v. *Briscoe* (2) is decisive in the respondents' favour. Before the Judicature Acts such an action as that could not have been brought. The claims are clearly in the alternative within Order XVI. r. 1. If the facts in the statement of claim are correct there is no doubt the plaintiffs have among them a claim to the eighteen bales. But they cannot say which of them are entitled because a portion of the cargo is unidentified. The plaintiffs are tenants in common of the unidentified bales: *Spence* v. *Union Marine Insurance Company* (3). The defendants' application is virtually to strike out all except one of the causes of action. To do so would be inconsistent with Order XVIII. r. 1, which is to prevent miscarriage of justice in consequence of misjoinder or non-joinder. In any case this is a mere irregularity, and the application was not made within reasonable time within Order LXX. r. 2.

Bigham Q.C. in reply.

The House took time for consideration.

Aug. 3. LORD HERSCHELL L.C.:—

My Lords, the appellants are the owners of a vessel called the *Castleton*. The respondents shipped certain cotton on board that vessel for carriage from a foreign port to Liverpool. On arrival at that port it was found that the marks of eighteen bales had been obliterated, and that, taking these into account, the total number which arrived was less by thirty-three than the number which, according to the bills of lading, had been shipped. Thereupon the present action was brought, the plaintiffs being the several holders of the bills of lading, either as

(1) 24 Beav. 86. (2) 2 Q. B. D. 496.
(3) Law Rep. 3 C. P. 427.

shippers or as indorsees from shippers, who had not received delivery of the number of bales specified in their bills of lading respectively. Upon the question whether such an action can be maintained, there has been a great difference of judicial opinion. Mathew J. refused to stay the action. Day and Collins JJ. in the Queen's Bench Division took a different view, but their judgment was reversed by the Master of the Rolls and Kay L.J., the late Bowen L.J. dissenting.

It is admitted that the claims of the plaintiffs are several, that they have no joint cause of action or claim to relief, and that before the Judicature Act they could not have been joined as plaintiffs in such an action as the present; but it is contended that Order XVI. r. 1 justifies the course which has been pursued in making them co-plaintiffs.

The argument of the learned counsel for the respondents went this length, that the rule sanctions the joinder of any number of plaintiffs, however distinct the causes of action in respect of which they are suing, subject only to this, that any defendant alleging that several causes of action have been united which cannot conveniently be disposed of together may, under Order XVIII. r. 8, apply for an order confining the action to such of the causes of action as can be conveniently disposed of together. If the argument be a sound one, it cannot, in my opinion, stop short of the point to which the learned counsel pressed it. The Master of the Rolls thought a more limited construction might be put upon the rule, that large as the words of the rule were, if the causes of action vested in the plaintiffs respectively were not merely separate causes of action, but were in respect of utterly distinct and different transactions, then the plaintiffs could not join in one action in respect of them. I am unable, with all deference, to find anything in the language of the rule to justify drawing such a line, nor can I see how it could in practice be drawn. Take the facts of the present case as an illustration. In what sense can it be said with accuracy that the different causes of action all arise out of the same transaction? The claim is in each case in respect of a breach of a separate contract to deliver the goods shipped. Whether the goods, the non-delivery of which is complained of, were in

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fact shipped, depends in each case upon a different set of circumstances. The several consignments may have been and probably were delivered to the shipowner by different persons, at different times, and under different circumstances. They were, it is true, delivered for carriage in the same ship, and were goods of the same description. But I cannot see that this makes the transaction one, any more than if goods consigned by different persons had been intended for carriage by different ships and had been of a different description. Precisely the same controversy, requiring just the same proof, might have arisen in the one case as in the other. And if the one case be within the rule, I see nothing in its terms to exclude the other.

Order XVI. r. 1 purports to deal merely with the parties to an action, and has, I think, no reference to the joinder of several causes of action. This subject is dealt with in Order XVIII. Yet if I correctly understand the argument of the respondents, the construction they put upon Order XVI. necessarily deals with the joinder of several causes of action, and confers, without reference to any other order or rule, the right "to unite in the same action several causes of action." For if it sanctions the joining of plaintiffs having separate and distinct causes of action, this involves of necessity the union in one action of several causes of action.

The rule provides that "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." This conveys to my mind the idea that the relief claimed by the plaintiffs who are joined is to be the same relief, especially when I consider that the rule only relates to the parties to an action, and that the right to join more than one cause of action is regulated by another rule. But for the use of the word "severally," I do not think any doubt would have been entertained that this was the true construction. There was naturally much discussion as to the meaning and effect of that word. In construing these rules, it must always be borne in mind that before the passing of the Judicature Act the practice and procedure of the Court of Chancery and the Courts of Common Law differed in many respects. It was a leading object of the rules framed under that Act to formulate a code of procedure which should in general be applicable to the Common Law and Chancery Divisions of the High Court alike. Now there can be no doubt that in the Court of Chancery there were many cases in which co-plaintiffs might severally be entitled to the same relief, and might, before the Judicature Act, have been properly joined, although their claim was neither joint nor alternative. There is, therefore, no difficulty in satisfying every word of the rule by the construction which I have suggested, and which, I confess, appears to me the natural one.

It cannot be doubted that whatever construction is put upon the rule I have been considering, must be applied equally to rule 4 of the same order. The result of the respondents' contention would be that any number of plaintiffs might join together to sue any number of defendants in respect of causes of action not common to either plaintiffs or defendants.

There are other rules of Order XVI. which seem to me to militate against this contention. It is difficult to understand how there could ever be a "misjoinder" if such a procedure were authorized. And what is the use of rule 6, which enables a plaintiff "at his option to join as parties to the same action all or any of the persons severally or jointly and severally liable on any one contract," if the previous rules have the effect contended for?

I do not pause to discuss the question whether the construction contended for by the appellants or by the respondents would be found to provide the more convenient procedure. I have endeavoured to construe the rule apart from such considerations; but this much I may say, that I am far from satisfied that the balance of convenience is, as the respondents contend, on their side.

I cannot accede to the argument urged for the respondents, that even if the joinder of the plaintiffs in one action was not warranted by the rule relied on, this was a mere irregularity of which the plaintiffs, by virtue of Order LXX., could not now take advantage. If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity.

Before concluding, I ought to refer to the case of *Booth* v. *Briscoe* (1), which was much relied on by the respondents. The plaintiffs who were joined in that action sued in respect of a libel impugning the management of an institution of which they were the trustees. No objection was taken to the constitution of the action. They recovered joint damages. In the Court of Appeal Lord Bramwell intimated an opinion that their causes of action were several, and that the damages should have been several also. But he thought that they might, nevertheless, under the circumstances, properly be joined. It is not necessary to determine whether that case was rightly decided. It is enough to say that it was a very different one from the present.

I think that the judgment of the Court of Appeal should be reversed, and the judgment of the Queen's Bench Division restored, and that the respondents should pay the costs here and below; and I move your Lordships accordingly.

LORD ASHBOURNE:—

My Lords, I have had an opportunity of reading and considering the judgment which has just been delivered by my noble and learned friend on the Woolsack, and also the opinion prepared by my noble and learned friend Lord Russell of Killowen, and I desire to express my entire concurrence with the conclusions at which they have arrived, and the arguments upon which those conclusions are founded.

LORD RUSSELL of KILLOWEN (after stating the facts as given above):—

My Lords, the question thus raised before your Lordships turns upon the proper construction of Order XVI. r. 1. That rule provides that "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court or a judge in disposing of the costs shall otherwise direct."

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(1) 2 Q. B. D. 496.

The Master of the Rolls thought that, grammatically construed, the order was wide enough in its terms to permit of the joining of any number of plaintiffs, although their causes of action related to entirely distinct and different transactions; but he thought that, in order to prevent the absurdity which he considered might arise from that wide construction, the rule ought to be construed with this limitation—namely, that although several plaintiffs with different and distinct causes of action might be joined together in one action, their causes of action must arise out of the same transaction. Further, he arrived at the conclusion that although the plaintiffs in this case have different causes of action, they are causes of action which did arise out of the same transaction, and that, therefore, the plaintiffs were here properly joined.

It seems to me that a serious ambiguity lies in the use of the words "same transaction" as here applied. I think that the causes of action here did not arise out of the same transaction. They arose out of similar but entirely distinct transactions, creating similar but entirely distinct legal liabilities. The goods of the several plaintiffs were, no doubt, sent in the same ship from the same port of shipment to the same port of discharge, and in that sense the plaintiffs may be said to have been parties to the same transaction; but in that sense only. The property in the goods was distinct in the case of each shipper, and the contracts of carriage were likewise distinct. There was no community of interest or of property as between the plaintiffs. In truth, the transaction was not one and the same. There were several transactions, similar indeed, but different and distinct from one another.

Kay L.J. was of opinion that if Order XVI. r. 1 stood alone the joining under one writ here attempted, of several plaintiffs with distinct and separate causes of action, was not authorized by the rule; but he thought that Order XVIII. r. 1 did authorize such joining, subject to the power of the Court or of a

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judge to intervene where considerations of convenience justified it. I cannot assent to this view. Order XVI. is conversant with a subject-matter different from that dealt with by Order XVIII. Order XVI. (principally in rules 1 and 4) deals with the *parties* to an action; but, in my judgment, Order XVIII. deals and deals only with the *causes of action* which may be joined together in an action properly constituted, as to parties, under Order XVI.

Bowen L.J. dissented from the view taken by the other members of the Court, and I concur both in the reasons of that learned Judge and in the conclusion at which he arrived.

I cannot agree with the Master of the Rolls in the limitation which, to avoid an absurdity, he introduces in the construction of rule 1 of Order XVI., namely, the limitation that the plaintiffs shall have been concerned in the same transaction. I find no such words of limitation either in rule 1 of Order XVI., dealing with plaintiffs, or in rule 4 of the same order, dealing with defendants; and, therefore, it seems to me that the only two possible constructions are those which were in fact the contentions of counsel at the Bar for the appellants and for the respondents respectively. For the respondents it was broadly contended that any number of plaintiffs with any number of distinct causes of action might join in one action within the meaning of the rule, subject only to the control of the Court or of a judge. I must dissent from this view. Indeed, if rule 1 is to have this wide construction, rule 4 must receive an equally wide construction. That rule provides as follows: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found liable, according to their respective liabilities, without any amendment."

According to this broad contention, therefore, it would be possible to join any number of plaintiffs with distinct causes of action against any number of defendants charged on distinct grounds of liability.

On the other hand, it was contended for the appellants that the plaintiffs who alone can be joined in one action under Order XVI. r. 1 are plaintiffs in whom, or in some of whom, not any, but the right to any relief claimed is alleged to exist. In my judgment, this is the true construction. In other words, the rule applies to cases where it is doubtful in which of the plaintiffs, or in what number of the plaintiffs, and whether jointly or severally, the legal right to relief exists, and also to cases (more frequent in the Chancery than in the Common Law Courts) in which several plaintiffs having separate rights claim the same relief. This view is strengthened by the fact that several of the rules following rules 1 and 4 of Order XVI. and rule 1 of Order XVIII. would have been unnecessary were the true construction the wide one contended for by the respondents.

It is not unimportant to observe that rule 11 of Order XVI., so far as it deals with misjoinder, only enables the Court or a judge to deal with the names of parties "improperly joined"; but it is difficult to see, if the construction of rule 1 contended for by the respondents be right, how there could be a misjoinder of plaintiffs. On the other hand, Order XVIII. r. 1, dealing with joinder of causes of action, gives the Court or a judge power to limit the joinder of causes upon considerations of convenience alone.

It was suggested at the Bar that, if this action were not allowed to proceed as now constituted, each plaintiff suing separately would be placed in a position of difficulty, because, it was urged, the defendants might attribute the unmarked bales, or a sufficient number of them, to the particular plaintiff suing, and so meet his claim. But this is not so. When the bales became unidentifiable, the several owners of cotton became, in point of law, owners in common of them in proportion to their respective interests, and the shipowner could only attribute such proportion in answer to any claim for non-delivery: *Spence* v. *Union Marine Insurance Company, Limited* (1).

The argument of convenience was strongly pressed upon your Lordships. I am by no means certain that that argument has, in the facts of this case, much weight; but whether it has or has not, it cannot be regarded if, as I think, the orders and rules do not authorize that joinder of plaintiffs which has been here attempted.

(1) Law Rep. 3 C. P. 427.

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A brief reference to the authorities is sufficient. As to the case of *Booth* v. *Briscoe* (1), it is only necessary to say that assuming that case to have been rightly decided, which it is not necessary to determine here, it differs widely from the present one, and it is no authority for the respondents' contention. That was a case in which the plaintiffs, managers of an asylum, brought an action in respect of a libel which did not reflect upon them individually or by name, but upon the management. They brought a joint action, and recovered joint damages. No objection was taken to the constitution of the action until the matter came before the Court of Appeal after trial, and Lord Bramwell came to the conclusion, in the circumstances I have mentioned, that as the complaint was of one and the same wrong they might be joined as co-plaintiffs.

In *Gort* v. *Rowney* (2), two plaintiffs suing together claimed relief in respect of separate and distinct causes of action. No objection was taken to the constitution of the action, which was referred to arbitration upon the terms that the costs were to abide the event, and the sole point to be determined was the question what was the event upon which the costs depended. Certain dicta of the Master of the Rolls in that case were relied upon by the respondents before your Lordships. But those dicta were not assented to by Bowen L.J. and were, in fact, not necessary for the decision of the question at issue.

A further point was taken at the Bar on the part of the respondents, namely, that the joinder of the plaintiffs in a way not authorized by Order XVI. was a mere irregularity, and that the appellants came too late to take advantage of it. This objection is not, in my judgment, well founded. In my judgment, such joinder of plaintiffs is more than an irregularity: it is the constitution of a suit as to parties in a way not authorized by the law and the rules applicable to procedure; and apart altogether from any express power given by the rules, it is fully within the competence of the Court to restrain and to prevent an abuse of its process.

On the whole, therefore, I come to the conclusion that the judgment of the Court of Appeal should be reversed, and judgment entered for the appellants with costs.

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(1) 2 Q. B. D. 496.

(2) 17 Q. B. D. 625.

LORD HERSCHELL L.C. :—

My Lords, my noble and learned friends Lord Watson and Lord Macnaghten, who are unable to be present to-day, have asked me to say that they have read the opinion which I have submitted to your Lordships, and that they entirely concur with it.

My Lords, I desire to add that I concur with my noble and learned friend Lord Russell in thinking that the difficulty which the plaintiffs apprehend by reason of some of the bales having arrived with the marks obliterated does not exist in this case, for the reasons which have been given by my noble and learned friend.

Order of the Court of Appeal reversed and order of the Queen's Bench Division restored; the respondents to pay the costs in this House and in the Courts below; cause remitted to the Queen's Bench Division.

Lords' Journals 3rd August 1894.

Solicitors for appellants: *Rowcliffes, Rawle & Co., for Hill, Dickinson, & Hill, Liverpool.*

Solicitors for respondents: *Wynne, Holme, & Wynne, for H. Forshaw & Hawkins, Liverpool.*

[HOUSE OF LORDS.]

H. L. (E.)
1894
June 22.

THE ARROW SHIPPING COMPANY, LIMITED . . . . APPELLANTS;

AND

THE TYNE IMPROVEMENT COMMISSIONERS . . . . RESPONDENTS.

THE "CRYSTAL."

Ship—Wreck—Obstruction to Harbour—Expenses of Removal—Liability of Shipowner—Harbours, Docks and Piers Clauses Act 1847 (10 & 11 *Vict.* c. 27) s. 56—*Removal of Wrecks Act* 1877 (40 & 41 *Vict.* c. 16) ss. 4, 6, 8.

A ship belonging to the appellants came into collision with another vessel and sank near the approach to a harbour where it was an obstruction to the navigation. There was no evidence of negligence on the appellants' part. The appellants gave their underwriters notice of abandonment as a total loss and were paid on that footing, and also gave the harbour authority notice of the abandonment. The harbour authority, acting under the Harbours, Docks and Piers Clauses Act 1847 and the Removal of Wrecks Act 1877, took possession of the wreck, raised part of the cargo and sold it, dispersed the wreck by explosives, and after deducting the proceeds of the cargo from the expenses sued the appellants for the balance under s. 56 of the Act of 1847:—

Held, reversing the decisions of Gorell Barnes J. and the Court of Appeal, that the appellants were not liable; because although owners of the ship when she became an obstruction, yet having abandoned her before the expenses were incurred, they were not "the owners" within the meaning of s. 56 of the Act of 1847 and were therefore not personally liable for the repayment:

Also, by Lord Macnaghten, because the expenses cannot be recovered from the owner where the wreck has been removed by destruction, since the Act of 1847 only gives the harbour authority power to "remove" and not to "destroy."

By Lord Herschell L.C. and Lords Watson and Macnaghten:—Sect. 56 of the Act of 1847 makes the owner of the wreck personally liable for the repayment of the expenses of removal; contrà by Lord Ashbourne.

Earl of Eglinton v. *Norman* (46 L. J. (Ex.) 557; 3 Asp. M. L. C. (N.S.) 471) overruled.

APPEAL from an order of the Court of Appeal (1). The *Crystal*, a vessel belonging to the appellants, on the 7th of

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(1) Not reported.

January, 1892, came into collision with another vessel, and sank at the mouth of the River Tyne and the harbour thereof. There was no evidence how the collision was caused, or that the owners of the *Crystal* or their servants were to blame.

On the 8th of January the respondents, as the harbour authority, gave notice to the appellants that the vessel was an obstruction to the river and harbour and approaches thereto, and to the navigation, and that if the obstruction was allowed to continue, the commissioners would, upon the expiration of seven days, proceed to take possession of and raise, remove, and, if necessary, destroy, the whole of the vessel, her tackle, equipment, and cargo, or such part thereof as to them might appear expedient, and that they would, if necessary, light and buoy the vessel until the raising, removing, or destruction thereof, and sell the vessel or such part thereof as should be raised and removed, together with any other property which should be recovered, and that they would hold the appellants liable for the expenses to be incurred. Between the 8th and 10th of January the appellants gave notice of abandonment of the *Crystal* as a total loss to their underwriters, who afterwards paid them the insurances.

On the 12th of January the appellants gave notice to the respondents that they had abandoned the vessel as a wreck in the open sea, and that the respondents must look to the savings or the wreck for any outlay they might have.

The respondents after the 14th of January proceeded to act under their own notice, and incurred, in the course of saving some of the cargo, charges amounting to about £1200 for a tug in attending and lighting the wreck, and warning approaching vessels. They further spent £1128 3*s*. 4*d*. in dispersing the wreck by explosives, and other matters in connection with that operation. The respondents succeeded in raising a portion of the cargo, which they sold for about £1800, and brought an action in the Admiralty Division against the appellants to recover the balance, made out as follows. From the proceeds of the cargo they deducted the charges in connection with the cargo and for warning vessels by way of lighting, leaving a balance in hand of £331 16*s*. 11*d*. They then debited the appellants with the various items which were peculiarly applicable to the removal of the wreck, and the result was that, after deducting from the total of those items (£1128 3*s.* 4*d.*) the balance of £331 16*s.* 11*d.*, there was a balance of £796 6*s.* 5*d.*, the amount of the claim in the action.

The respondents derived their powers under certain local Acts, which incorporated the Harbours, Docks and Piers Clauses Act of 1847.

Sect. 56 of that Act enacts: "The harbour master may remove any wreck or other obstruction to the harbour, dock or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof, and the expense of removing any such wreck, obstruction, or floating timber, shall be repaid by the owner of the same, and the harbour master may detain such wreck or floating timber for securing the expenses, and on non-payment of such expenses on demand may sell such wreck or floating timber, and out of the proceeds of such sale pay such expenses, rendering the overplus (if any) to the owner on demand."

Sect. 4 of the Removal of Wrecks Act 1877 enacts: "Where any vessel is sunk, stranded or abandoned in any harbour or tidal water under the jurisdiction of a harbour or conservancy authority, or in or near any approach thereto, in such manner as in the opinion of the authority to be, or be likely to become an obstruction or danger to navigation in that harbour or water, or in any approach thereto, the authority may take possession of and raise, remove or destroy the whole or any part of the vessel, and may light or buoy any such vessel or part until the raising, removal or destruction thereof, and may sell, in such manner as they think fit, any vessel or part so raised or removed, and also any other property recovered in the exercise of their powers under this Act, and may, out of the proceeds of such sale, reimburse themselves for the expenses incurred by them under this Act, and shall hold the surplus, if any, of such proceeds in trust for the persons entitled thereto."

Sect. 6 enacts: "The provisions of this Act shall apply to every article or thing, or collection of things, being or forming part of the tackle, equipment, cargo, stores, or ballast of a vessel in the same manner as if it were included in the term 'vessel';

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and for the purposes of this Act, any proceeds of sale arising from a vessel, and from the cargo thereof, or any other property recovered therefrom, shall be regarded as a common fund."

Sect. 8: "The powers conferred by this Act shall be deemed to be in addition to and not in derogation of any other powers for the like object."

Gorell Barnes J. held that the appellants were liable upon the authority of *Earl of Eglinton* v. *Norman* (1), and that, reading the Acts of 1847 and 1877 together, the respondents were entitled to have the proceeds of the cargo applied first in discharge of the items which they could incur only under the Act of 1877, and were not bound to apportion them rateably between the expenses incurred under the two Acts. Accordingly, Gorell Barnes J. pronounced in favour of the plaintiffs' claim for damages, subject to a reference to the registrar as to the amount, and condemned the defendants in the damages and costs. This decree was affirmed by the Court of Appeal (Lindley, A. L. Smith, and Davey L.JJ.).

March, 19, 20. *Finlay* Q.C. and *Scrutton* for the appellants:—

Sect. 56 of the Harbours, Docks and Piers Clauses Act 1847 was not intended to alter the common law or to impose this fresh and heavy liability on an innocent owner who has abandoned the wreck. The principle is expressed by Lord Cairns L.C. in *River Wear Commissioners* v. *Adamson* (2) that the statute was not intended "to create a new right and a new liability to damages unknown to the common law." The same observation is applicable to the Removal of Wrecks Act 1877. This case was held by Gorell Barnes J. and the Court of Appeal to be governed by *Earl of Eglinton* v. *Norman* (1), where it was held that the "owner" who is liable is he who was the owner when the wreck became an obstruction. But in that case the owner had not abandoned the vessel and so it is distinguishable from the present. In *The Edith* (3) it was held that no personal liability is imposed on the owner where the wreck is caused either by

(1) 46 L. J. (Ex.) 557; 3 Asp. M. L. C. (N.S.) 471.

(2) 2 App. Cas. 743, 751.

(3) 11 L. R. Ir. 270.

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the act of God or the negligence of some person other than the owner. In *Earl of Eglinton's Case* (1) Bramwell L.J. held there was no abandonment, but if there had been there would have been no liability: "I do not think the Legislature intended to alter the substantive law of the realm." Thus *Earl of Eglinton's Case* (1) is really in favour of the appellants; and Bramwell L.J.'s view is supported by *River Wear Commissioners* v. *Adamson* (2). The authorities shew that the owner of a wrecked vessel which has been abandoned is not liable for damage, per Sir F. Jeune in *The Utopia* (3), *The Douglas* (4). Sect. 56 gives first the power to remove the obstruction; secondly the power to detain it by way of security; and thirdly power of sale. No other than the statutory remedy can be imposed: Maxwell on Statutes, p. 496, 2nd ed. In respect of rates and other charges it is clear the remedy is confined to ship and cargo: sects. 44, 45; 74, 75. A lien such as is given by these sections is incompatible with personal liability: *Underhill* v. *Ellicombe* (5). So in *Stevens* v. *Evans* (6) Denison J. says: "Upon a new statute which prescribes a particular remedy no remedy can be taken but the particular remedy prescribed by the statute." It is of course different where the Act of Parliament creates an obligation to pay money: *Shepherd* v. *Hills* (7). Moreover, it is often impossible to fix the time when a wreck becomes an obstruction. The words of the statute only apply at the time at which the expense is incurred, which might be long after the wreck. But the appellants, by abandoning the vessel, had long ceased to be liable. The Act of 1877 sect. 4 affords an additional argument that the sole remedy is against the corpus of the wreck. The two Acts must be read together. If the commissioners had the large discretion which the respondents' case implies, they might throw the burden on the owner or the public at will. In construing the Act of 1847 the then state of the common law must be considered. If a liability is imposed it must be clearly expressed, and no other than the statutory remedy can be pursued. There is no statutory provision for the case of the proceeds of the wreck proving insufficient. Then as to the apportionment of the common fund, under the Act of 1877 sect. 6 they cannot apply that fund according to their own pleasure, but must use it pro rata for payment of all the expenses under the two statutes.

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(1) 46 L. J. (Ex.) 557; 3 Asp. M. L. C. (N.S.) 471.

(2) 2 App. Cas. 743, 751.

(3) [1893] A. C. 493, 498.

(4) 7 P. D. 151.

(5) M'Cl. & Y. 450.

(6) 2 Burr. 1152, 1157.

(7) 11 Ex. 55; 25 L. J. (Ex.) 6.

Sir *W. Phillimore* (*Butler Aspinall* with him) for the respondents:—

Where there is no question between cargo and owners there can be no question of appropriation. The respondents are partially secured creditors. In *River Wear Commissioners* v. *Adamson* (1) Lord Blackburn says (pp. 762–3) that the other sections have little or no bearing on sect. 56. Lord Gordon's speech (p. 773) is in favour of the respondents. In the Irish Act under which *The Edith* (2) was decided the words are different. The Act of 1847 did not merely put existing penalties into statutory language. The common form clause in private Acts was only half of this clause and gave no lien. The language is clear. Some one is to "repay" the local authority; so that a personal liability must exist. Ships have been put on a different footing from other property, such as glass fallen on a road or a broken carriage. The duty which arises in the case of a ship becoming an obstruction is explained in *Brown* v. *Mallett* (3) and in *White* v. *Crisp* (4). Here the harbour authority is bound to remove the obstruction, and the reasonable expenses of doing so are recoverable from some one. The owner must be the person who was owner at the time of the disaster, for then the ownership could be ascertained. If the appellants contend that the underwriters were the owners, they should have so pleaded.

[LORD HERSCHELL L.C. referred to *Randal* v. *Cockran* (5).]

The possession of the salvors is the possession of the owners. The statutory liability is provided for in policies of insurance. See also Thames Conservancy Act 1857 (20 & 21 Vict. c. cxlvii.) ss. 86, 87. The owner will not generally come forward unless there is a surplus after the sale. It is clear that the underwriter cannot be made liable for more than 100 per cent. of his risk.

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(1) 2 App. Cas. 743, 751.

(2) 11 L. R. Ir. 270.

(3) 5 C. B. 599.

(4) 10 Ex. 312.

(5) 1 Ves. Sen. 97.

Scrutton replied.

The House took time for consideration.

June 22. LORD HERSCHELL L.C.:—

My Lords, the question raised by this appeal is one of considerable importance. The facts are few and not in dispute. [His Lordship stated them.]

The respondents' claim, in so far as it relates to the expense of removing the wreck, is based on sect. 56 of the Harbours, Docks and Piers Clauses Act 1847, which is in these terms:—[His Lordship read them.]

The Courts below have followed the decision of the Court of Appeal in the case of *Earl of Eglinton* v. *Norman* (1), where it was held that the section I have just quoted casts upon the persons who were the owners of the vessel at the time she became a wreck and impeded the navigation a personal liability to pay the costs of removing the obstruction. I quite agree with them that there is no substantial distinction between that case and the present. It is contended, however, on behalf of the appellants that a judgment of this House in the case of *River Wear Commissioners* v. *Adamson* (2) delivered after the date of the decision of the Court of Appeal in the case of *Earl of Eglinton* v. *Norman* (1), has thrown doubt on that decision and indicated that the section ought not to be so construed as to cast upon the owners of a vessel under such circumstances a liability unknown to the common law.

The case of *River Wear Commissioners* v. *Adamson* (2) turned upon another section of the same Act, namely, sect. 74, which makes the owner of every vessel or float of timber answerable to the undertakers for any damage done by such vessel or float of timber or by any person employed about the same, to the harbour,

(1) 46 L. J. (Ex.) 557; 3 Asp. M. L. C. (N.S.) 471.
(2) 2 App. Cas. 743.

dock, or pier. In that case damage was done by the respondents vessel to the appellants' pier without any fault upon the part of the respondents. The Court of Appeal had held that the respondents were not liable, mainly on the ground that the damage was caused by the act of God. Although the judgment was affirmed in this House, the noble and learned Lords who heard the case did not rest their opinions on this ground.

Lord Cairns (then Lord Chancellor) came to the conclusion that the section was not intended to create a right to recover damages in cases where before the Act there was not a right to recover damages from some one; that it was intended only to provide a ready and simple procedure for recovering damages where a right to damages existed at common law. He thought that the section relieved the undertakers from the investigation whether the fault had been the fault of the owner, or of the charterer, or of the persons in charge, and taking the owner as the person who is always discoverable by means of the register, declared that he should be the person answerable, leaving him to recover over against the person liable. Lord Hatherley, after expressing the very great doubt and difficulty which he had felt as to the proper interpretation of the clause, said that as it was the opinion of the majority of their Lordships that the case was not one that could be regarded as struck at by this clause, whether the ground to be assigned for it was the view expressed by Lord Cairns or whether any view might be adopted similar to that taken in the Court below he should not pause to inquire, but that he was unwilling to do anything further than to say that he could not concur in the opinion expressed by the Lord Chancellor otherwise than with extreme doubt and hesitation. Lord O'Hagan thought that the section pointed to something done by the act of man or to the act of the person in charge. Lord Blackburn stated that he had had very great doubt and hesitation in the case; that he could not see anything in the language of the Act to justify the view adopted by Lord O'Hagan, that it was confined to cases in which some one was in charge of the ship; but that after much hesitation and doubt he was not prepared to say that the judgment should be reversed, and that the words "damage done by the ship" necessarily included all expenses occasioned

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by misfortunes in which the ship was involved in common with the piers. After referring to the fact that Mellish L.J. in the Court below seemed to have thought that the words used might bear the more restricted sense of injuria cum damno, he concluded thus: "The declared object of the enactment is the protection of the piers, &c. 'from injury,' which renders this construction a little less violent than if the object had been expressed to be to protect the harbour authorities from 'loss.' If they can bear that sense, we ought to construe them so; and though I have had, and have, great doubt whether this is not too violent a construction, I am not prepared to reverse the judgment based on it; and consequently I agree that the appeal should be dismissed with costs." Lord Gordon dissented from the judgment pronounced, and thought that the appellants were entitled to succeed.

My Lords, I think a review of the opinions thus pronounced is sufficient to shew that no principle can be extracted from the judgments in that case which can be applied to the construction of other sections of the Act.

Although I am of opinion that in the present case, there being no evidence that the disaster was due to the negligence either of the appellants or their servants, they would be under no liability at common law for damage caused by the obstruction or for the expenses incurred in removing it, yet I am unable to find any valid ground on which the operation of sect. 56, which casts upon the owner the liability to pay for the expenses of removing the obstruction, can be limited to cases in which such liability would exist at common law.

I am fully alive to the force of the argument, and feel much impressed by it, that the obstruction is removed for the benefit of the public at large, and that where the owner of the vessel which has met with a disaster has not been to blame, it is hard that the loss of his vessel should entail on him the further burden of bearing expenses incurred not for his benefit but for that of the public. But a sense of the possible injustice of legislation ought not to induce your Lordships to do violence to well-settled rules of construction, though it may properly lead to the selection of one rather than the other of two possible interpretations of the enactment. In the present case, however, I am unable to see that there are two alternative constructions. The harbour-master may remove "any wreck," and the expense of removing "any such wreck" is to be "repaid by the owner of the same." Where is there any ground for restricting this to cases where the owner of the wreck is himself, if not bound to remove it, at least subject to liability for damage caused by its presence, if he does not take that course? I can find none.

The appellants further contended that if a new statutory liability was imposed by the section, the same enactment provided the remedy, and that those who desired to enforce the liability were limited to the remedy thus provided. It was urged that the section conferred the remedy of detaining and selling the wreck and satisfying the expenses out of the proceeds; that it did not provide any other mode of recovering the expenses, and that the harbour authority was, therefore, restricted to this remedy.

This argument found favour with the Irish Court of Appeal in the case of *The Edith* (1), who gave effect to it by their judgment in that case, when the construction of a similar provision came before them for determination.

I confess I have approached the consideration of the terms of the statute with no indisposition to arrive at the same conclusion, but I am unable to do so. In the first place the terms are express, that the expense of removing the wreck "shall be repaid by the owner of the same." The construction contended for appears to me to give no effect to these very precise words. If all that was intended was that the expenses were to be paid out of the proceeds of the wreck, why were these words inserted, followed as they are by the words, "and the harbour-master may detain and sell"? Moreover, this power is expressed to be for "securing the expenses," and the power to sell is on "non-payment on demand." The truth is, that the contention of the appellants makes the latter words of the section alone operative, and gives no more effect to the words "shall be repaid by the owner" than if they had been omitted from the enactment. But this is not all: the latter part of the enactment, which it is said provides the only remedy, is not co-extensive with the earlier provisions. Authority is given to remove any wreck "or other obstruction," and also any floating timber which impedes the navigation. The expense of removing any such wreck, obstruction, or floating timber is to be repaid by the owner of the same; but power is only given to detain and sell such "wreck or floating timber." The word "obstruction" is omitted. Why the power was not extended to other obstructions than wrecks and floating timber is matter of speculation. It may have been a mere slip, but it would scarcely be legitimate to construe the enactment on the assumption that it was so. There can be no doubt that it is just as explicitly enacted in the case of any other obstruction as in the case of a wreck, that the expense shall be repaid by the owner, and yet if the construction contended for by the appellants were to prevail, the conclusion must either be that no means were provided for enforcing the liability in terms imposed, or that because no remedy was provided a personal debt was created in the case of an obstruction other than a wreck, but not in the case of a wreck, although the language as to repayment is identical in the two cases. I do not say that this is conclusive, but it adds to the difficulty of acceding to the interpretation insisted upon by the appellants.

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(1) 11 L. R. Ir. 270.

For the reasons I have given I do not see my way to differ from the Courts below in holding that the terms of sect. 56 do create a debt in respect of which an action may be maintained against the owner.

But then arises the question, Who is the owner within the meaning of the statute? The Court of Appeal, in the case of *Earl of Eglinton* v. *Norman* (1), held that it was the person who was the owner at the time the obstruction occurred and the right of the harbour-master, therefore, to remove it accrued. They considered, that although the right of the harbour-master to remove it was only inchoate, the rights of all parties were then irrevocably fixed, and that it mattered not what change afterwards took place in the ownership of a wreck.

The words of the section do not expressly point out who is the owner referred to, and if the section had been held to apply only

(1) 46 L. J. (Ex.) 557; 3 Asp. M. L. C. (N.S.) 471.

to cases where the obstruction came about by the default of the owner there would be much to be said for the view thus adopted. But inasmuch as the section ex hypothesi applies even where there is no such default, I do not see any à priori reason for holding that the rights of the parties are then fixed. It is obvious that some time might elapse before the removal of the wreck which became an obstruction was determined on by the harbour-master, and that a change of ownership might occur in the interval.

My Lords, when I examine the language of the section, it appears to me to point not to ownership at the time the obstruction is created, but to ownership at the time the expense of removing it is incurred. The expenses are to be repaid by the owner. The harbour-master may sell the wreck on non-payment of such expenses on demand. And, lastly, if the wreck is sold, and the proceeds exceed the expenses, the overplus is to be returned to the owner on demand. This can scarcely mean the person who was the owner at the time the obstruction was caused, but must surely be intended to refer to the person whose wreck was disposed of and removed.

In the present case it seems clear that before the time when the expenses were incurred by the respondents, the appellants had abandoned the vessel as derelict on the high seas, without any intention of resuming possession or ownership. They had also given notice of abandonment to the underwriters. It is unnecessary to determine whether the underwriters are to be treated as the owners within the meaning of the statute; it is enough to say that I do not think the appellants can on its true construction be regarded as having, at the time the expenses were incurred, been the owners and liable to repay them.

I have, like some of the noble and learned Lords who took part in the decision of the case of *River Wear Commissioners* v. *Adamson* (1), felt the greatest doubt and difficulty as to the proper mode of dealing with this case. The history of the statute (of which the section in question forms part) is pointed out by Lord Blackburn in that case. Many of the clauses probably had their origin in the desire of the authorities who promoted harbour Acts to secure adequate protection for their undertakings, and may have been adopted by the Legislature without sufficiently careful consideration of the interests of other persons and the liability which might with justice be imposed upon them. I cannot profess that the conclusion at which I have arrived is completely satisfactory to my own mind; but I think it is better to adhere in such a case as closely as one can to settled rules of construction, leaving any necessary changes in the law to be effected by the Legislature, rather than to attempt by a strained and violent construction to arrive at what, after all, may be very halting justice.

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(1) 2 App. Cas. 743.

A subordinate point was raised in this case. The respondents incurred certain expenses in lighting and watching the wreck under the Removal of Wrecks Act 1877. They applied the proceeds derived from the sale of the wreck towards the expenses incurred by them, both under the Act of 1847 and the later statute. They then sued for the balance of the expenses. It was contended that they were bound to apply the moneys received pro rata to the expenses incurred under the two statutes. This contention was repelled by the Courts below, and I see no reason to differ from the views expressed on this point.

My Lords, for the reasons I have given, I think the judgment appealed from ought to be reversed, and judgment entered for the defendants with costs. The respondents must pay the costs here and in the Courts below.

LORD WATSON:—

My Lords, this appeal depends upon the construction of a single section in the Harbours, Docks and Piers Clauses Act 1847. [His Lordship then stated the facts, and the claim made in the action.]

The claim thus made and sustained has, admittedly, no warrant in the Act of 1877. It is based exclusively upon sect. 56 of the Act of 1847, which provides that "The harbour-master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof; and the expense of removing any such wreck, obstruction, or floating timber shall

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be repaid by the owner of the same, and the harbour-master may detain such wreck or floating timber for securing the expenses, and on non-payment of such expenses on demand may sell such wreck or floating timber, and out of the proceeds of such sale pay such expenses, rendering the overplus, if any, to the owner on demand."

The argument of the appellants was directed to these two points only. They maintained, in the first place, that the clause does not attach to "the owner" any personal liability for expenses; and in the second place that, if it does, they neither are, nor were at any time, the owners of the wreck of the *Crystal*, within the meaning of the clause. It does not admit of doubt, that if the appellants can establish either of these propositions, the judgments appealed from must be reversed.

I do not find it necessary to enter upon the consideration of the first of these points; because I am satisfied that the argument of the appellants upon the second of them ought to prevail. Had it been necessary to decide the first point, I could not, as at present advised, have differed from the opinion expressed by the Lord Chancellor. I cannot agree with the able judgment of the Irish Court in the case of *The Edith* (1), and I am unable to appreciate the bearing of *River Wear Commissioners* v. *Adamson* (2) upon the facts of the present case.

I agree with the Lord Chancellor in thinking that their abandonment of the sunken ship in the open sea, sine animo recuperandi, had divested the appellants of all proprietary interest in the wreck before the respondents commenced operations with a view to its removal. That state of the facts necessarily gives rise to the question, whether the expression "the owner" of the wreck, as it occurs in sect. 56, is meant to designate the owner of the ship at the time when she goes to the bottom of the sea, or the owner of the wreck at and during the time of its removal.

Mr. Justice Gorell Barnes, and the learned judges of the Appeal Court, accepted as binding upon this point the decision of the Court of Appeal in *Earl of Eglinton* v. *Norman* (3). In that case, it was laid down by the present Master of the Rolls, with the concurrence of Lord Coleridge, and a very hesitating assent by Lord Bramwell, that when a ship sinks in such a position as to cause obstruction to a harbour or its approaches, a right to remove it at the expense of the then owner at once accrues to the harbour authorities, and cannot be affected by any subsequent change or loss of ownership. I do not think it is reasonably possible to arrive at that conclusion, except by holding that the Legislature, in using the words "owner of the wreck," meant thereby to designate the owner of the ship at the time when she became a wreck. If that had been the intention of the Legislature nothing could have been easier than to give it expression. But the intention of the Legislature can only be gathered from the language actually employed; and I am of opinion that the construction adopted by the learned judges of the Appeal Court in *Earl of Eglinton* v. *Norman* (1) is inadmissible.

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(1) 11 L. R. Ir. 270.
(2) 2 App. Cas. 743.
(3) 3 Asp. M. L. C. (N.S.) 471.

The only thing which the harbour-master, under the clause in question, has authority to deal with is the wreck, and not the ship; and the only charges which, in any view, he can have right to recover are those which may be duly incurred by him for the purpose, and in the course of its removal. It is clear to my mind, that, primâ facie, the owner of the wreck must be the person to whom the wreck belongs during the time when the harbour-master chooses to exercise his statutory powers. That appears to me to be the primary and natural meaning of the words. It may, of course, be displaced by force of the context. But I can find nothing in the context to suggest that the words were intended to have any other than their natural meaning. On the contrary, the direction in the end of the clause, to the effect that the harbour-master, after selling the materials of the wreck in order to pay the expenses which he has incurred, shall account to the owner for any overplus, clearly indicates that the owner is the person to whom the materials belonged.

Being of opinion that the respondents have failed to shew that the appellants were owners of the wreck of the *Crystal* within the meaning of the clause, I concur in the judgment which has been proposed by the Lord Chancellor.

(1) 3 Asp. M. L. C. (N.S.) 471.

LORD ASHBOURNE :—

My Lords, the decision of this appeal depends on the construction to be given to the 56th section of the Harbours, Docks and Piers Clauses Act 1847 the terms of which have been stated by my noble and learned friends who have preceded me.

The contention of the appellants substantially raises two questions upon this section. They insist (1.) that no personal liability is cast upon "the owner" for the expenses claimed; and (2.) that, no matter how that may be, they are not "the owners" who are chargeable.

The statute above-mentioned does not apply to all harbours, docks and piers; for the first section enacts that it shall "extend only to such harbours, docks and piers as shall be authorized by any Act of Parliament hereafter to be passed, which shall declare that this Act shall be incorporated therewith."

The statute was so incorporated by the Tyne Improvement Acts, and thus the questions are raised. Had the wreck occurred in or near any harbour where such incorporation had not taken place, it is not suggested that the appellants could have been made liable.

It is admitted that they would not be responsible at common law, and therefore the whole case turns upon the construction of this clause which creates this new responsibility. There should be clear words to create any such liability, and in construing the section the rule must be borne in mind that where the liability is a liability not existing at common law, but for the first time imposed by the statute, then if the remedy is also prescribed by statute, the party must pursue that remedy. Before taking the words of the section, it is well to consider the nature and character of this personal liability sought under this section for the first time to be imputed to an "owner." It is claimed that although he be not negligent, although his master and crew may have shewn the most splendid seamanship and the most heroic courage, he is personally liable for the expense of the removal of the wreck of his ship, if it causes an obstruction to the harbour or navigation. The wreck may be caused by the act of God, by the default of the pilot he is compelled by law to employ, by the absence of the very buoys and lighthouses which the harbour authority is itself bound to provide; but no qualification of the owner's liability is suggested. Smugglers or mutineers may have wrecked the ship and made it an obstruction; but the possibility of an exception is not admitted. It is claimed that this personal liability is unlimited in amount, that no matter how small the value of the vessel, or how worthless the cargo, the "owner" must answer to his last farthing for these expenses. The cost of removal might be twenty times the value of the ship, and the payment of that cost might drive the "owner" into bankruptcy; but that is not a consideration to be noted. It may be even claimed that this liability is not safeguarded by any limit of time or space; that the wreck might sink, causing no obstruction outside a harbour; yet years after it might, by the action of storms, or wind or tide, be shifted to a position where it became an obstruction, when this liability would attach. In fact, it is contended that under all circumstances, no matter what the conduct, or what the amount involved, the "owner" is personally liable, and that he is so made for the first time under this section. It is not too much to expect that a section imposing such a tremendous liability should do so in clear terms. The section is not clear; its interpretation is difficult, its language is infelicitous; but it can be made to work smoothly and without difficulty if the contention of the respondents is rejected, and that of the appellants adopted.

In my opinion, no personal liability is created by the section. The first object of the section was to give power to the harbour-master to remove the wreck or obstruction. Then, if the owner repays the expenses, he may take away his property. If he does not repay the expenses the harbour-master is given his remedy, the power of detaining the wreck with the further power of selling, on non-payment of the expenses after demand. Then it is finally provided that, after payment of the expenses out of the proceeds, the overplus, if any, is to be rendered to the owner "on demand." The words "the expense . . . . shall be repaid by the owner" cannot be taken alone. The whole section must be read together. The ship and its proceeds on sale were, as far as they went, to provide the fund for the expense; and, accordingly, whilst the section provides for handing over the surplus to the owner, there are no words saying that he is to make good the deficiency.

It is not suggested that there is anything in the subsequent Removal of Wrecks Act 1877 to support the respondents' construction of this sect. 56. Yet if that construction is correct, we would expect to find the same liability in sect. 4 of the later Act. These Acts deal with the same subject-matter, and it may well be that the Act of 1877 may supply some interpretation of this earlier provision. It is, at all events, worthy of note that the common law antecedent to the Act of 1847, and the statute law subsequent to that date, impose no personal liability of any kind for this expense.

The learned judges in the Courts below followed the decision of the Court of Appeal in the case of *Earl of Eglinton* v. *Norman.* (1) Only one of the judges of the Court of Appeal in this case said that he would have decided the same way, and Davey L.J. said that whenever the case was reconsidered, Mr. Finlay's argument was worthy of the greatest consideration.

On this point, therefore, one cannot decide in favour of the appellants without impeaching the authority of the *Earl of Eglinton* v. *Norman.* (1) I would infer from the report of that case that the Court had not brought prominently before them several of the arguments by which your Lordships have been aided, and this is noted expressly in his judgment by A. L. Smith L.J. That case, however, decides on this section that a personal liability was attached to the "owner," and for the reasons I have already stated I have arrived at an opposite conclusion, and with great deference to the learned judges who took part in that decision, and to my noble and learned friend on the Woolsack, I do not think it can be supported.

The case of *The Edith* (2), decided on similar words in another statute, is entirely opposed to the construction which would impose any personal responsibility on the owner, and Palles C.B. there strongly relied upon the argument that when a new right is created by a section, and there is a remedy given in that section, that is the only remedy which is given at all.

(1) 3 Asp. M. L. C. (N.S.) 471.

(2) 11 L. R. Ir. 270.

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The case of *River Wear Commissioners* v. *Adamson* (1) has also been relied upon by the appellants as shaking the authority of the case of *Earl of Eglinton* v. *Norman.* (2) It cannot be relied upon as a direct authority, being upon a different section of the statute, but I think it has a bearing on the case, and can be usefully considered in connection with some of the arguments addressed to your Lordships. That case turns upon sect. 74 of the Act of 1847, which says that "the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber to the harbour, dock or pier, or the quays, or works connected therewith." These words would appear to be clear and unqualified, and are certainly far more clear and unqualified than those of sect. 56. But when an owner, who had been in no default, was sought to be made liable under its terms, a large majority of this House declined to recognize his liability. I concur with my noble and learned friend on the Woolsack that no very clear principle can be extracted from the judgments; but I, at all events, gather this, that although one noble and learned Lord was unable to see any way of escape from the apparently clear words of the section, the other noble and learned Lords decided that the clause must be held to refer to something in which man was concerned and not the casualties brought about by the act of God. The judgment ot Lord Blackburn shews in every word the doubt and difficulty he felt in arriving at this conclusion. He points out that "the shipowner, if liable at all under this statute, is liable to his last farthing for the whole damage, however great, and however small may be the value of the ship"; and, again, "before deciding that the construction of the statute is such as to work this hardship, we ought to be sure that such is the construction, more particularly when the hardship affects not only one individual, but a whole class"; and he adds, "after much hesitation and doubt I am not prepared to say that this judgment should be reversed." I am disposed to think that if the noble and learned Lords who decided the case of *River Wear Commissioners* v. *Adamson* (1) had also been called upon to decide the present case, they would have held that a shipowner was no more per-

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(1) 2 App. Cas. 743.

(2) 3 Asp. M. L. C. (N.S.) 471.

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sonally liable under sect. 56 than under sect. 74. It would have been difficult for them to hold an owner personally liable under the rather cumbrous words of sect. 56, when they had just exonerated him from such liability under the much clearer and more absolute words of sect. 74. In so holding, a consistent and workable construction is given to both sections, and none of the startling consequences, to which I have adverted at an earlier stage of my remarks, would have resulted.

On the second question, as to who is the owner under the statute, I might possibly have felt some difficulty if I had come to a different conclusion on the first point. If the owner was personally liable, an attempt might be made to argue against a construction under which he would be allowed to evade his liability, after the wreck and after the obstruction, by a mere assignment. The arguments and judgments in the case of *Earl of Eglinton* v. *Norman* (1) are largely conversant with this question of the owner, and I think there may have been possibly some difference of opinion as to the time when he was to be ascertained with a view to the suggested liability. Sir H. James for the plaintiff argued that the owner at the time of the casualty was the owner under the statute, and this view was accepted by Lord Chief Justice Coleridge. Lord Bramwell and the Master of the Rolls held that the owner was the owner at the time the wreck became an obstruction, but it is not easy to know whether there was any real difference of opinion between them and the Chief Justice. I agree with my noble and learned friends who have preceded me, that the owner referred to in the section is the owner at the time the harbour-master incurred the expense; and, concurring as I do generally in the arguments they have expressed in support of this conclusion, I see no good purpose in repeating or attempting to add to them.

In my opinion also the judgment should be reversed.

LORD MACNAGHTEN :—

My Lords, apart from the provisions of sect. 56 of the Harbours, Docks, and Piers Clauses Act 1847 it seems to be clear that, according to English law, the owner of a shipwrecked and

(1) 3 Asp. M. L. C. (N.S.) 471.

sunken vessel which has become an obstruction to navigation through no fault on his part, and of which he has lost or relinquished the possession, management, and control, is not under any obligation to remove it or under any liability to pay or contribute to the payment of the expenses of its removal.

The subject was much discussed in an elaborate judgment by Maule J. in the Common Pleas, *Brown* v. *Mallett* (1). The principles laid down in that judgment were approved in the Exchequer in *White* v. *Crisp* (2), and those two authorities have been followed in a recent case in the Privy Council: *The Utopia* (3).

Maule J. says: "Where the navigation . . . . has become obstructed by a vessel which has sunk and been lost to the owner without any fault of his, the public inconvenience of the obstruction is one in respect of which the owner differs from the rest of the public only in having sustained a private calamity in addition to his share of a public inconvenience, and this difference does not appear to be any reason for throwing on him the cost of remedying or mitigating the evil. In the case of *Rex* v. *Watts* (4) Lord Kenyon held that the owner of a ship sunk in the Thames by accident and misfortune without his default or misconduct was not liable to an indictment for not removing the obstruction. It was contended for the prosecution in that case that although the defendant was not *punishable* for causing the nuisance, it having arisen from accident, it was his *duty* to remove it; but the learned judge answered that perhaps the expense of removal might have amounted to more than the whole value of the property. The same reason would apply in the case of an indictment for not giving notice by signal, or taking other means to prevent damage from a sunken vessel; the expense of doing so might and probably would be greater than any private benefit which the owner might derive from it; and whether it were greater or not, the reason seems to be the same for not throwing on the owner any special share in the consequence of a public misfortune with which he had no particular concern, except that it arose out of a private disaster which he had innocently suffered." Then he adds that in the case of such impediments to navigation arising out of unavoidable accidents, "the proper rule seems to be that the expense of removing or diminishing the danger arising from them should be defrayed by those who would be benefited by such a measure."

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(1) 5 C. B. 599.

(2) 10 Ex. 312.

(3) [1893] A. C. 492.

(4) 2 Esp. N. P. C. 675.

My Lords, it seems to me that legislation contravening the principles and reversing the rule laid down by Maule J. would be legislation that might be described, not unaptly, as barbarous. At the same time there would be nothing unreasonable in making the owner, whose private misfortune has caused a public nuisance, pay or contribute to the expense of its removal, if and so far as he derives a private benefit from the operation.

With these general remarks I approach the consideration of sect. 56. The question seems to me to be this: Does that section throw upon the owner of a vessel which has become a wreck, and, as such, is an obstruction to navigation, the whole expense of its removal in every event and under all circumstances, or does it only throw the expense upon him if and so far as he is specially benefited by the removal? The result of the one construction, if it be admissible, would be fair and reasonable, the result of the other would be repugnant to justice, and in many cases, as my noble and learned friend Lord Ashbourne has pointed out, cruel and unreasonable in the extreme.

The first observation that occurs to one is that this section is found in a collection or group of clauses which are headed with the words: "And with respect to the appointment of harbour-masters, dock-masters, and pier-masters and their duties, be it enacted as follows." "An Act so penned," says Lord Wensleydale, speaking of the Lands Clauses Consolidation Act 1845, which is framed in a similar manner, "cannot be read as a continuous enactment would be; various clauses relating to each separate subject are collected under various heads, with an appropriate heading to each class, which must apply to the whole of that class of which it is the heading"; and he adds that the effect is the same as if the heading had been repeated at the head of each section (*Eastern Counties, &c.*,

Companies v. *Marriage* (1)). The section, therefore, must be read in connection with the general heading. So read, it purports to be concerned primarily with the duties of harbour-masters, dock-masters, and pier-masters. That is the scope of the section and its proper province. The general heading supplies the key to the enactment. There is no indication that the enactment was intended to effect a serious alteration in the law to the prejudice and detriment of individuals. It rather seems to be indicated that nothing more was intended than to confer upon the harbour-master, acting in the public interest, power to do on behalf of the owner that which might be done by the owner himself in his own interest, with less regard perhaps to the interest of the public.

Then the section says that the expense of removing the wreck "shall be repaid by the owner of the same." The word "repaid," again, rather looks as if the framers of the enactment had in their minds repayment by one on whose behalf the operation was conducted. But that is a very slight indication of intention, because it may perhaps point to the circumstance that in the majority of cases the work would be done, not by the harbour-master himself and his servants, but by persons whose trade and business it is to do such work, and whom he would have to pay in the first instance. The words "shall be repaid by the owner" are the great difficulty in the case. I am unable to construe the section as confining the right of the harbour-master in respect of repayment to payment out of the proceeds of the wreck—(1) because that construction in reality gives no effect whatever to the words "shall be repaid by the owner," and (2) because such a construction would give an unfair advantage to the owner. An owner with a keen eye to his own interest would never think of offering repayment unless the value of the wreck greatly exceeded the cost of removal. He would wait until the harbour-master puts the wreck up for sale, and then he would probably have the opportunity of buying it for an old song; at the outside the only risk he would run would be the risk of having to bear the expenses of the sale. I do not question the rule that where a new right is created and a remedy given by one and the same enactment, that remedy is the only remedy to be pursued. But I do not see how that rule can be applied to sect. 56 so as to limit the re-imbursement of the harbour-master to the proceeds of the sale of the wreck, because it seems to me that, according to the true construction of the section, the harbour-master has two remedies — a personal remedy against the owner, as well as a remedy against the proceeds of the sale.

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(1) 9 H. L. C. 32, 69.

I am therefore of opinion that the section does impose upon the owner of a wreck removed by the harbour-master under the powers thereby conferred, the duty of paying the expenses of removal. But this does not settle the question between the parties to this litigation. In order to make any one liable the wreck must be "removed" within the meaning of that word as used in the section, and after all the only person who can be made liable is the owner of the wreck. In the present case I do not think that there has been a removal for which anybody can be made liable, and I am further of opinion that the owners of the *Crystal* before she was wrecked are not the owners of the wreck within the meaning of sect. 56.

It seems to me that the removal contemplated by sect. 56 is removal in the interest and on behalf of the owner as well as in the interest and for the benefit of the public. To entitle the harbour-master to repayment under sect. 56, it is I think incumbent upon him to remove the obstruction in such a manner that at the conclusion of the operation it is substantially in the same plight and condition as it was at the commencement, or at any rate with some regard to the interest of the owner whose interest I think the enactment meant to be regarded. What has the harbour-master done here? He has "dispersed the wreck by explosives." That no doubt is a very complete and effectual sort of removal, but it is not, I think, the sort of removal which is contemplated by the section. It is to be observed that under this section the harbour-master is not given power to destroy. Another statute was passed to give that power. Here there was not removal, but total destruction. Not one scrap or atom of the wreck was salved; not a single penny is brought into the account as the produce of the sale of any part of the wreck. It sounds to me like a grim joke to ask the owner, where there is an owner, to pay for the expense of annihilating his property because he is chargeable by statute—and fairly chargeable—with the cost of its removal.

Then comes the question, Are the persons who were the owners of the *Crystal* at the time of the accident which caused the wreck the owners of the wreck within the meaning of the section? I lay out of consideration what took place between the owners and the underwriters. I will deal only with what took place between the harbour authority and the owners. On the 8th of January 1892 the Tyne Improvement Commissioners gave notice to the owners of the *Crystal* that the vessel, which was then lying sunk at the harbour entrance, was an obstruction to the navigation, and that if the obstruction was allowed to continue, they would on the expiration of seven days proceed to take possession of, remove, and if necessary, destroy the whole of the vessel. On the 12th of January, before the expiration of the seven days, the owners replied by letter that the steamer being a wreck in the open sea they had abandoned her as such, and the commissioners must look to the savings or the wreck for any outlay they might have.

My Lords, it appears to me that by that letter the owners declared that they had abandoned all rights of property and given up all interest in the vessel. Thereupon I think they ceased to be "owners" within the meaning of sect. 56. They had lost possession of the vessel already; all that remained to them was the property in the vessel—that is to say, the right to retake or resume possession of her. This right they abandoned as plainly and as unequivocally as it was possible for them to do, and they abandoned it before the commissioners began their operations or even took possession. They disowned the wreck. For the purposes of sect. 56 it is not I think necessary to enquire whether goods designedly abandoned by their owner under such circumstances that no wrong is done to anybody by the abandonment become thereupon "bona vacantia" and "derelict" in the proper sense of the word, or whether, as the author of Doctor and Student asserts (c. 51), the property still remains in the owner notwithstanding the abandonment. The commissioners appear to be in a dilemma. They have destroyed the wreck. Sect. 56 does not authorize destruction. If they take their stand on the Removal of Wrecks Act 1877 they cannot under it charge the owner with their expenses. If they do not rely on the powers of that Act their action must be attributed to the licence or authority which the notice of abandonment conferred, and then their action would have the effect of divesting the owners of the *Crystal* of the property if any which still remained in them after their notice of abandonment.

If the view which I venture to present be correct, sect. 56 is a reasonable enactment. Where the owner of the vessel which is wrecked gives the harbour authority to understand that he retains his right of property in the wreck, and they remove it so as to be in a position to return it to him substantially in the same condition in which it was when they commenced operations, they can charge him, I think, with the cost of removal, though the cost may exceed the value of the thing removed. Where he tells them plainly that he has abandoned the wreck, they may deal with it as they please, without regard to him; but they cannot make him personally liable for their expenditure. The defects, such as they were, in sect. 56 are remedied by the Removal of Wrecks Act 1877. Under that Act the harbour authorities may destroy the wreck if they think fit, although there be an owner claiming an interest in it, and they may do the work of destruction without regard to the owner's interest.

I am unable to agree with the decision of the Court of Appeal in *Earl of Eglinton* v. *Norman* (1), and I am of opinion that the judgment of the Court of Appeal, which is founded upon it, should be reversed, and the action dismissed with costs.

LORD MORRIS:—

My Lords, I concur in the judgment proposed. The facts of this case have been so fully stated by your Lordships who have preceded me that it is quite unnecessary I should repeat them. The defendants are under no common law liability of any kind.

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(1) 3 Asp. M. L. C. (N.S.) 471.

Their liability is the subject of express enactment:—10 & 11 Vict. c. 27, s. 56, enacts: "The harbour-master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof, and the expense of removing any such wreck, obstruction, or floating timber shall be repaid by the owner of the same, and the harbour-master may detain such wreck or floating timber for securing the expenses, and on non-payment of such expenses on demand may sell such wreck or floating timber, and out of the proceeds of such sale pay such expenses, rendering the overplus, if any, to the owner on demand."

Does that enactment make the defendants liable for the expenses of removing the wreck under the circumstances of this case? I am of opinion it does not. It appears to me that it is only in the case of an owner—that is, of a person remaining in the position of owner and in possession of the wreck—that any personal liability would apply to him; that if he abandon the wreck, or if the harbour authority take possession of the wreck and sell, the person who had been owner remains so no longer, except for the purpose of getting any surplus over the expenses out of the proceeds of the sale by the harbour authority, and incurs no personal liability. If the harbour authority did not arrest and detain the offending obstruction (in this case the wreck), and supposing that the owner remains owner, it may be that he would be liable, as he chooses to keep the offending obstruction, and consequently should be held liable to pay the expense of the removal of what he keeps as his property; but when he gives the harbour authority notice that he disclaims any property in the wreck, the only remedy for the harbour authority is to sell the wreck. The ordinary relation of debtor and creditor, from which an obligation to pay on request would be implied, is not created. The owner is in no default by himself or his servants; he abandons the property of the wreck, whereupon it becomes the subject which is to pay for the expense of its removal. The final clause of the section, while providing for return of overplus, if any, does not proceed to say that any deficiency is to be made up by the owner. Where an action is

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intended or distress intended to be empowered, the action or distress is directly given, as in sects. 43, 44, and 45.

Order appealed from and decree of the Admiralty Division reversed, and judgment entered for the defendants below with costs here and below; cause remitted to the Admiralty Division.

Lords' Journals 22nd June 1894.

Solicitors for appellants: *Thomas Cooper & Co.*

Solicitors for respondents: *Maples, Teesdale & Co., for Lietch, Dodd, Bramwell, & Bell, Newcastle-on-Tyne.*

[HOUSE OF LORDS.]

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THORSTEN NORDENFELT (PAUPER) . . APPELLANT;

AND

THE MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY, LIMITED . } RESPONDENTS.

Restraint of Trade—Trader—Covenant in Restraint of Trade—General Restraint—Partial Restraint—Time—Space—Public Policy.

A patentee and manufacturer of guns and ammunition for purposes of war covenanted with a company to which his patents and business had been transferred that he would not for twenty-five years engage except on behalf of the company either directly or indirectly in the business of a manufacturer of guns or ammunition:—

Held, affirming the decision of the Court of Appeal ([1893] 1 Ch. 630), that the covenant though unrestricted as to space was not, having regard to the nature of the business and the limited number of the customers (namely the Governments of this and other countries), wider than was necessary for the protection of the company, nor injurious to the public interests of this country; that it was therefore valid and might be enforced by injunction.

APPEAL from an order of the Court of Appeal (1). The question turned upon a covenant in restraint of trade, unrestricted as to space, made on the 12th of September 1888 between the appellant and the respondent company, under the circumstances related in the judgment of Lord Herschell L.C. The covenant was in these words:—

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(1) [1893] 1 Ch. 630.

"The said Thorsten Nordenfelt shall not, during the term of twenty-five years from the date of the incorporation of the company if the company shall so long continue to carry on business, engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns gun mountings or carriages, gunpowder explosives or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company, provided that such restriction shall not apply to explosives other than gunpowder or to subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper. Provided also that the said Thorsten Nordenfelt shall not be released from this restriction by the company ceasing to carry on business merely for the purposes of re-constitution or with a view to the transfer of the business thereof to another company so long as such other company taking a transfer thereof shall continue to carry on the same."

The appellant having afterwards entered into an agreement with other manufacturers of guns and ammunition, the respondent company brought an action against him to enforce the covenant by injunction.

Romer J. made an order declaring that the covenant was void as being unreasonable and beyond what was required for the protection of the company.

The Court of Appeal (Lindley, Bowen and A. L. Smith L.JJ.) were of opinion that the covenant was too wide in its application to any business which the company might carry on during twenty-five years, but was valid as regarded the gun and ammunition business, and varied the order of Romer J. by declaring "that the covenant is valid so far as it relates to the trade or business of a manufacturer of guns gun mountings or carriages, gunpowder explosives or ammunition (except explosives other than gunpowder or subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper)." And the Court granted an injunction and ordered an inquiry accordingly (1).

April 13, 16, 17. The appellant in person:—

The judgment of Bowen L.J. is inconsistent with the decision of the Court of Appeal in *Davies* v. *Davies* (2) and with *Tallis* v. *Tallis* (3) in which Lord Campbell C.J. expressly stated that though the restriction may be unlimited in respect of time, there must be some limit of space. The Court of Appeal has altered the law. It cannot be the law that a man should be prevented from earning his living in any part of the wide world. The true principle is that the restraint must not be wider than is necessary for the protection of the covenantee: *Rousillon* v. *Rousillon* (4); *Mills* v. *Dunham* (5). The present case does not come within any of the exceptions to the general principle against restraints of trade. The business was sold without reserve, and the covenant was not made in connection with the sale of the business and is thus doubly void, as there was no consideration, and the restraint is in effect a universal one, both as to time and space. Further, it would be against public policy to enforce the covenant; as the special knowledge acquired is no longer available for the service of the British Government. Besides, the respondents are sufficiently protected by their patents; and to enforce the covenant would be an indirect and illegitimate method of prolonging or extending those patents.

Sir *R. E. Webster* Q.C. and *W. F. Hamilton* for the respondents:—

The restraint is not greater than is required for the protection of the respondents, who were in a position to impose more stringent terms. It cannot be against public policy to prohibit the appellant from giving his advice or assistance to foreign Governments, and Bowen L.J. seemed to intimate that a stipulation that he should not advise the British Government might be illegal. The limits of such covenants must vary with the

(1) [1893] 1 Ch. 630.
(2) 36 Ch. D. 359.
(3) 1 E. & B. 391.
(4) 14 Ch. D. 351.
(5) [1891] 1 Ch. 576.

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progress of trade and international intercourse, and also according to the character of the business. The case is practically one of a trade secret to which the law forbidding retraint of trade does not apply. The appellant is not prevented from earning his living. He may, for instance, make and sell sporting guns. The alleged absence or inadequacy of consideration is a matter which the Court cannot consider: *Gravely* v. *Barnard* (1).

[They also cited *Rousillon* v. *Rousillon* (2), *Mitchel* v. *Reynolds* (3), and *Tallis* v. *Tallis* (4), and the cases referred to in the Courts below.]

The appellant in reply:—

There is nothing in the nature of a trade secret, as any one could make one of the guns from a pattern. Many of the patents expire in a year or two, and the respondents are thus practically getting a large extension of these patents. The terms imposed are oppressive, especially as the company has sold its business at 100 per cent. profit.

The House took time for consideration.

July 31. LORD HERSCHELL L.C.:—

My Lords, the question raised by this appeal is, whether a covenant entered into between the parties can be enforced against the appellant, or whether it is void as being in restraint of trade.

The covenant in question was contained in an agreement of the 12th of September 1888, and was in these terms "(2.) The said Thorsten Nordenfelt shall not, during the term of 25 years from the date of the incorporation of the company if the company shall so long continue to carry on business, engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns gun-mountings or carriages, gunpowder explosives or ammunition or in any business competing or liable to compete in any way with that for the time being carried on by the company; provided that such restriction shall not apply to explosives other than gunpowder or

(1) Law Rep. 18 Eq. 518, 522.
(2) 14 Ch. D. 351, 363.
(3) 1 P. Wms. 181.
(4) 1 E. & B. 391.

to subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper. Provided also that the said Thorsten Nordenfelt shall not be released from this restriction by the company ceasing to carry on business merely for the purpose of reconstitution or with a view to the transfer of the business thereof to another company so long as such other company taking a transfer thereof shall continue to carry on the same." The agreement also provided that the appellant should, for seven years from the incorporation of the respondent company, retain the share qualification of a director, and should act as managing director of the company, at a remuneration of £2000 a year, together with a commission upon the net profit of the company.

Before directing attention to the particular terms of the covenant, and to the considerations to which it gives rise, it is necessary to advert to the position of the parties at the time the agreement was entered into.

The appellant had, prior to March 1886, obtained patents for improvements in quick-firing guns, and carried on, amongst other things, the business of the manufacture of such guns and of ammunition. In that month he procured the registration of a limited liability company, which was to take over his business, with the business assets and liabilities. On the 5th of March 1886 an agreement was made between the appellant and the Nordenfelt Guns and Ammunition Company by which the company was to purchase the goodwill of the appellant's business, and all the stock, plant, and patents connected therewith, he covenanting to act as managing director for a period of five years, and so long as the Nordenfelt Company should continue to carry on business "not to engage, except on behalf of such company, either directly or indirectly in the trade or business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that carried on by such company."

The agreement for purchase was duly carried into effect, and the price paid to the appellant, namely, £237,000 in cash, and £50,000 in paid-up shares of the company. In July 1888 negotiations were entered into for the amalgamation of the Nordenfelt Company and the Maxim Gun Company, and for the transfer of their business and assets to a new company, to be called the Maxim-Nordenfelt Guns and Ammunition Company.

By an agreement for the amalgamation of the two companies, dated the 3rd of July 1888, and made between the Maxim Company, the Nordenfelt Company, and P. Thaine, on behalf of the new company, the Nordenfelt Company agreed that they would procure the appellant to enter into the agreement which was afterwards embodied in the instrument of the 12th of September 1888.

The respondents were incorporated on the 17th of July 1888, and on the 8th of August the agreement of the 3rd of July was adopted by the company. It is to be noted that at the time when this agreement was entered into, to which the Nordenfelt Company was a party, the appellant was managing director of that company, and that, in the memorandum of association of the amalgamated company which was signed by the appellant, the objects of the company were stated to be, inter alia, not only the adoption of the agreement of the 3rd of July, but also "to acquire, undertake, and carry on as successors to the Maxim Gun Company and the Nordenfelt Guns and Ammunition Company, the goodwill of the trade and businesses heretofore carried on by such companies and each of them, and the property and rights belonging to or held in connection therewith respectively."

This is of importance, because the appellant in a forcible argument pointed out that the judgment of the Court of Appeal was largely founded on the fact that the covenant in question was entered into in connection with the sale of the goodwill of the appellant's business, and was designed for the protection of the goodwill so sold, and he contended that this was an error, inasmuch as there was no sale by him of the goodwill on that occasion, he having already parted with it to the Nordenfelt Company, the later sale being by that company and not by him.

I think it is impossible to accede to this contention. Upon the sale by the appellant to the Nordenfelt Company, the goodwill was conveyed to them, and was protected by a covenant in some respects larger than the one he entered into in September 1888, but it was limited to the time during which that company should carry on business; it therefore necessarily ceased when the Nordenfelt Company and the Maxim Company were absorbed by the new company. But in the agreement for the amalgamation (to the making of which, as I have said, the appellant was a party) the covenant which the Nordenfelt Company undertook to obtain from the appellant was to be in addition to the transfer by the Nordenfelt Company of the full benefit of any obligations which Mr. Nordenfelt was then under to that company, and by the terms of the memorandum of association of the new company the object was, as I have shewn, stated to the world to be the acquisition of the goodwill of the Nordenfelt Company.

My Lords, in view of these facts, I think the case must be treated on precisely the same footing as if the obligations of the covenant under consideration had been undertaken in connection with the direct transfer to the respondents of the goodwill of the appellant's business and with the object of protecting it.

The appellant mainly relied upon the fact that the covenant was general, that is to say, unlimited in respect of area, and argued that it was therefore void. I think it was long regarded as established, as part of the common law of England, that such a general covenant could not be supported.

In early times all agreements in restraint of trade, whether general or restricted to a particular area, would probably have been held bad; but a distinction came to be taken between covenants in general restraint of trade and those where the restraint was only partial. The distinction was recognised and given effect to by Lord Macclesfield in his celebrated judgment in *Mitchel* v. *Reynolds* (1). That was a case of particular restraint, and the covenant was held good, the Chief Justice saying, "that wherever a sufficient consideration appears to make it a proper and a useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, namely, where the restraint is general, not to exercise a trade throughout the kingdom, and where it is limited to a particular place, for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shewn by-and-by." And at a later part of the judgment, after dividing voluntary restraints by agreement into those which

(1) 1 P. Wms. 181.

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are, first, general, or secondly, particular as to places or persons, he formulates with regard to the former the following proposition: "General restraints are all void, whether by bond, covenant, or promise, &c., with or without consideration, and whether it be of the party's own trade or not." In the case of *Master, &c., of Gunmakers* v. *Fell* (1), Willes C.J. said the general rule was "that all restraints of trade, (which the law so much favours,) if nothing more appear, are bad . . . But to this general rule there are some exceptions, as, first, if the restraint be only particular in respect to the time or place, and there be a good consideration given to the person restrained."

As I read the authorities, until the cases to which I shall call attention presently, the distinction between general and particular restraints was always maintained, and the latter alone were regarded as exceptions from the general rule, that agreements in restraint of trade were bad.

In the case of *Horner* v. *Graves* (2), Tindal C.J. said: "The law upon this subject (i.e. restraint of trade) has been laid down with so much authority and precision by Parker C.J. in giving the judgment of the Court of B. R. in the case of *Mitchel* v. *Reynolds* (3), which has been the leading case on the subject from that time to the present, that little more remains than to apply the principle of that case to the present. Now, the rule laid down by the Court in that case is, 'that voluntary restraints, by agreements between the parties, if they amount to a general restraint of trading by either party, are void, whether with or without consideration; but particular restraints of trading, if made upon a good and adequate consideration, so as it be a proper and useful contract,' that is, so as it is a reasonable restraint only, 'are good.'"

Formulated

After stating that the case then before the Court did not "fall within the first class of contracts as it certainly did not amount to a general restraint," he proceeded to consider whether the particular covenant was a good one.

It is true that in a later part of his judgment the following passage occurs: "In the case above referred to, Parker C.J.

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(1) Willes, at p. 388.

(2) 7 Bing. 735.

(3) 1 P. Wms. 181.

says, 'a restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good'; which are rather instances and examples, than limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to the particular case." But I cannot, in view of the passage which I have quoted from the earlier part of his judgment, understand this as an indication of opinion on the part of Tindal C.J. that there was no distinction in point of law between general and particular restraints; that in the case of both alike the only question is whether in the particular case the restraint is reasonable. If so, it could hardly be said that the law had been laid down with precision by Parker C.J., nor could such contracts be accurately divided into two classes, if every particular case, whether it fell within the one class or the other, was, in point of law, to be dealt with in precisely the same manner. I am confirmed in this view of Tindal C.J.'s opinion by his judgment in the subsequent case of *Hinde* v. *Gray* (1). In that case the defendant had entered into a covenant with the plaintiffs, to whom he had demised a brewery in Sheffield, that he would not, during the continuance of the demise, carry on the trade of brewer or agent for the sale of beer in Sheffield or elsewhere; but would, so far as the same should not interfere with his private avocations, give all the advice and information in his power to the plaintiffs with regard to the management and carrying on of the brewery. The breach alleged was that the defendant had solicited and obtained orders for ale not purchased of the plaintiffs nor brewed by them, and that large quantities of ale had thereunder been delivered and sold. There was a demurrer to this breach; judgment was given for the defendant, Tindal C.J. saying that it was "assigned on a covenant which according to the case of *Ward* v. *Byrne* (2) was void in law." This is, to my mind, only intelligible if *Ward* v. *Byrne* (2), which was the case of a bond conditioned not to follow or be employed in the business of a coal merchant for nine months, was regarded as establishing, as a matter of law, that a covenant in general restraint, though limited in point of time, was void; unless it were so, I do not see how it could be regarded

(1) 1 Man. & G. 195.

(2) 5 M. & W. 548.

as determining that the covenant in question in *Hinde* v. *Gray* (1) was void; or, indeed, as an authority in the case of any covenant not practically identical in all respects. It is clear that there are material distinctions between the circumstances of the two cases; and, if the only question was whether the covenant was reasonable in view of the particular circumstances, considerations might well be urged (as indeed they were by the learned counsel for the plaintiffs) why the case then before the Court should not be regarded as governed by *Ward* v. *Byrne* (2); but Tindal C.J. did not proceed to inquire whether, under the particular circumstances appearing on the record in *Hinde* v. *Gray* (1), the covenant was a reasonable one, or was wider than was requisite for the protection of the plaintiffs, but treated the case as concluded, as matter of law, by authority.

I need not further refer to *Ward* v. *Byrne* (2), except to say, that although the learned judges in that case did express an opinion that the covenant exceeded what was necessary for the protection of the covenantee, they seem to me to recognise that covenants for a partial restraint, and these only, are exceptions from a general rule invalidating agreements in restraint of trade. In that case, the attempt was made, unsuccessfully, to maintain that a covenant otherwise general might be regarded as a particular restraint, if limited in point of time: a contention for which some colour was afforded by the language used in earlier cases.

The views which I have expressed appear to me to have been entertained by that very learned lawyer Mr. John William Smith, as shewn by his notes to *Mitchel* v. *Reynolds* (3). He lays down the law thus: "In order, therefore, that a contract in restraint of trade may be valid at law, the restraint must be, first, partial, secondly, upon an adequate, or, as the rule now seems to be, not on a mere colourable consideration, and there is a third requisite, namely, that it should be reasonable." This exposition of the law has, further, the very weighty sanction of Willes and Keating JJ., who, after the death of Mr. J. W. Smith, edited the notes to his collection of leading cases.

(1) 1 Man. & G. 195.
(2) 5 M. & W. 548.
(3) 1 P. Wms. 181.

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In the year after the decision of *Hinde* v. *Gray* (1) the case of *Whittaker* v. *Howe* (2) came before Lord Langdale. Howe had covenanted not to practise as a solicitor in any part of Great Britain for twenty years, having sold his business to the plaintiff. In spite of this he commenced again practising in London, where he had previously carried on business. On an application for an interlocutory injunction, it was contended that the covenant was void. The Master of the Rolls refused to accede to this contention and granted the injunction. It was, of course, clear that a covenant not to practise in London, as he was in fact doing, would have been good, and it was natural that his conduct should not find favour at the hands of the Court. But the question was whether so extensive a covenant as that entered into could be supported. The case of *Mitchel* v. *Reynolds* (3) was cited in argument, but neither *Ward* v. *Byrne* (4) nor *Hinde* v. *Gray* (1) appear to have been brought to the notice of the Court. Lord Langdale expressed himself thus (*Whittaker* v. *Howe* (2)) "Agreeing with the Court of Common Pleas, that in such cases 'no certain precise boundary can be laid down within which the restraint would be reasonable, and beyond which excessive,' having regard to the nature of the profession, to the limitation of time, and to the decision that a distance of 150 miles does not describe an unreasonable boundary, I must say, as Lord Kenyon said in *Davis* v. *Mason* (5), 'I do not see that the limits are necessarily unreasonable, nor do I know how to draw the line.'"

The learned judge distinctly indicated that he had not arrived at an irrevocable conclusion, for he added: "In the progress of the case it may become necessary to consider further the points which have been raised; but at present I am of opinion that the right claimed by Mr. Howe to act in violation of the contract for which he has received consideration, is, to say the least, so far doubtful, that he ought not to be permitted to take the law into his own hands." It is not necessary to consider whether the decision can be supported, though it was regarded by Willes and Keating JJ. as questionable, and it is certainly difficult to see why,

(1) 1 Man. & G. 195.
(2) 3 Beav. 383, 394.
(3) 1 P. Wms. 181.
(4) 5 M. & W. 548.
(5) 5 T. R. 118.

if a covenant not to practise as an attorney in Great Britain is good, a covenant such as was in controversy in *Hinde* v. *Gray* (1) should have been pronounced bad in point of law on demurrer. But I cannot accept it as a weighty authority on the question whether it was regarded as a rule of the common law that a general covenant in restraint of trade was void, in view of the authorities I have already referred to.

There have been differing expressions of opinion on the subject by distinguished equity judges in more recent times. I will only allude to two of these, in which the existence of the rule I have been considering has been questioned. In the case of the *Leather Cloth Company* v. *Lorsant* (2) James V.C. said: "I do not read the cases as having laid down that unrebuttable presumption which was insisted upon with so much power by Mr. Cohen. All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract."

And again, in *Rousillon* v. *Rousillon* (3), Fry J. thus expressed himself: "I have therefore, upon the authorities, to choose between two sets of cases, those which recognise and those which refuse to recognise this supposed rule; and, for the reasons which I have mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognise this rule, and I consider that the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances in which such a prohibition has been unreasonable."

I do not intend to throw doubt on what was decided in these cases, for reasons which will appear hereafter, but I respectfully differ from the view which appears to be indicated that there was not at any time a rule of the common law distinguishing particular from general restraints, and treating the former only as exceptions from the general principle that contracts in restraint of trade are invalid.

The discussion on which I have been engaged is, it must be admitted, somewhat academic. For, in considering the application of the rule, and the limitations, if any, to be placed on it, I think that regard must be had to the changed conditions of commerce and of the means of communication which have been developed in recent years. To disregard these would be to miss the substance of the rule in a blind adherence to its letter. Newcastle-upon-Tyne is for all practical purposes as near to London to-day as towns which are now regarded as suburbs of the metropolis were a century ago. An order can be sent to Newcastle more quickly than it could then have been transmitted from one end of London to the other, and goods can be conveyed between the two cities in a few hours and at a comparatively small cost. Competition has assumed altogether different proportions in these altered circumstances, and that which would have been once merely a burden on the covenantor may now be essential if there is to be reasonable protection to the covenantee.

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(1) 1 Man. & G. 195.

(2) Law Rep. 9 Eq. 345.

(3) 14 Ch. D. 351.

When Lord Macclesfield emphasized the distinction between a general restraint not to exercise a trade throughout the kingdom and one which was limited to a particular place, the reason which he gave for the distinction was that "the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shewn by-and-by." He returns to the subject later on, when giving the reasons why all voluntary restraints are regarded with disfavour by the law, in these terms: "Thirdly, because in a great many instances they can be of no use to the obligee; which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London what another does at Newcastle? And surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The Roman Law would not enforce such contracts by an action. (See Puffendorf, lib. 5, c. 2 s. 3. 21 H. 7, 20)." There are other passages in the judgment where this view is enforced.

There is no doubt that, with regard to some professions and commercial occupations, it is as true to-day as it was formerly, that it is hardly conceivable that it should be necessary, in order to secure reasonable protection to a covenantee, that the covenantor should preclude himself from carrying on such profession or occupation anywhere in England. But it cannot be doubted that in other cases the altered circumstances to which I have alluded have rendered it essential, if the requisite protection is to be obtained, that the same territorial limitations should not be insisted upon which would in former days have been only reasonable. I think, then, that the same reasons which led to the adoption of the rule require that it should be frankly recognised that it cannot be rigidly adhered to in all cases.

My Lords, it appears to me that a study of Lord Macclesfield's judgment will shew that if the conditions which prevail at the present day had existed in his time he would not have laid down a hard-and-fast distinction between general and particular restraints, for the reasons by which he justified that distinction would have been unfounded in point of fact.

Whether the cases in which a general covenant can now be supported are to be regarded as exceptions from the rule which I think was long recognised as established, or whether the rule is itself to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that whether the covenant be general or particular the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law.

I think that a covenant entered into in connection with the sale of the goodwill of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser. It has been recognised in more than one case that it is to the advantage of the public that there should be free scope for the sale of the goodwill of a business or calling. These were cases of partial restraint. But it seems to me that if there be occupations where a sale of the goodwill would be greatly impeded, if not prevented, unless a general covenant could be obtained by the purchaser, there are no grounds of public policy which countervail the disadvantage which would arise if the goodwill were in such cases rendered unsaleable.

I would adopt in these cases the test which in a case of partial restraint was applied by the Court of Common Pleas in *Horner* v. *Graves* (1), in considering whether the agreement was reasonable. Tindal C.J. said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable." The tendency in later cases has certainly been to allow a restriction in point of space which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of 150 or even 200 miles has not been held too much in some cases. For the same reason I think a restriction applying to the entire kingdom may in other cases be requisite and justifiable.

I must, however, guard myself against being supposed to lay down that if this can be shewn the covenant will in all cases be held to be valid. It may be, as pointed out by Lord Bowen, that in particular circumstances the covenant might nevertheless be held void on the ground that it was injurious to the public interest.

My Lords, I turn now to the application of the law to the facts of the present case. It seems to be impossible to doubt that it is shewn that the covenant is not wider than is necessary for the protection of the respondents. The facts speak for themselves. If the covenant embraced anything less than the whole of the United Kingdom it is obvious that it would be nugatory. The only customers of the respondents must be found amongst the Governments of this and other countries, and it would not practically be material to them whether the business were carried on in one part of the United Kingdom or another.

So far I have dealt only with the covenant in relation to the

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(1) 7 Bing. 735, 743.

United Kingdom. The appellant appeared willing to concede that it might be good if limited to the United Kingdom; but he contended that it ought not to be world-wide in its operation. I think that in laying down the rule that a covenant in restraint of trade unlimited in regard to space was bad, the Courts had reference only to this country. They would, in my opinion, in the days when the rule was adopted, have scouted the notion that if for the protection of the vendees of a business in this country it were necessary to obtain a restrictive covenant embracing foreign countries, that covenant would be bad. They certainly would not have regarded it as against public policy to prevent the person whose business had been purchased and was being carried on here from setting up or assisting rival businesses in other countries; and for my own part I see nothing injurious to the public interests of this country in upholding such a covenant.

When the nature of the business and the limited number of customers is considered, I do not think the covenant can be held to exceed what is necessary for the protection of the covenantees.

I move your Lordships, therefore, that the judgment appealed from be affirmed, and the appeal dismissed.

LORD WATSON:—

My Lords, the order appealed from directs that, for five-and-twenty years from and after the 17th of June 1888, the appellant shall, if and so long as the respondent company or any company taking a transfer of its business shall continue to carry on business during that period, be restrained from engaging, "either directly or indirectly, in the trade or business of a manufacturer of guns, gun mountings or carriages, gunpowder explosives or ammunition (except explosives other than gunpowder, or subaqueous boats or torpedoes, or castings or forgings of steel or iron, or alloys of iron or of copper)." The prohibition is not confined to English, or even to British, soil; it extends to every part of the surface of the globe available for the purpose of carrying on the process of manufacture.

The order does nothing more than enforce, according to its terms, an undertaking given to the respondent company by the

Lord Watson.

appellant upon the occasion of their taking over, in the year 1888, from the Nordenfelt Company, the extensive business which had been established by the appellant, and had been transferred by him to the latter company in March 1886. At the bar of the House the appellant, for the first time, pleaded that the undertaking given by him to the respondent company was without adequate consideration, and could not warrant the injunction of which he complains. I have all along been satisfied, for the reasons explained by the Lord Chancellor, which I shall not repeat, that the plea is groundless, and that, for the purposes of this appeal, the appellant stands in the same position as if his undertaking had been given to the Nordenfelt Company in consideration of the full price which was paid to him by that company for the stock and goodwill of his business.

The main question discussed in the Courts below, and the only question which, in my opinion, it is necessary for your Lordships to decide, is raised by the appellant's contention that the personal restraint to which he has agreed to submit, being unlimited in space, is contrary to the recognised policy of English law, and is therefore incapable of being enforced by an English Court. The decisions, at common law and in equity, which bear more or less directly upon the question thus arising, are very numerous. They have been reviewed by the learned judges of the Appeal Court, who all arrived at the same conclusion by independent lines of reasoning, which are occasionally divergent. Some of the more important of those cases have been noticed by the Lord Chancellor, and will be criticized by my noble and learned friend, Lord Macnaghten. I have, as in duty bound, read and considered all the cases cited; but I do not propose to refer to them in detail. I shall simply endeavour to indicate the considerations which have led me to concur with your Lordships in affirming the order of the Court of Appeal.

With regard to the facts of this case, I have only to observe, that they are, from a legal point of view, exceptional. Their parallel is not to be found in any of the reported cases; but they are such as may naturally be expected to occur in the altered and daily altering conditions under which trade is conducted in modern times. The manufacturing department of the business, which the appellant sold in 1886, was, and still is, carried on at extensive works in England and in Sweden. The business might be said to be local in that sense, but in that sense only. The area which it supplied was and is practically unlimited. The customers who buy the products, which the appellant agreed he should not manufacture, are necessarily a limited class, but they are to be found all over the world. They include, or, strictly speaking, consist of, Governments and potentates, great and small, civilized and savage, who for purposes offensive or defensive desire to possess, and have the means of paying for, Nordenfelt guns with suitable ammunition.

It does not seem to admit of doubt that the general policy of the law is opposed to all restraints upon liberty of individual action which are injurious to the interests of the State or community. Nor is it doubtful that Courts will rightly refuse to enforce any compact by which an individual binds himself not to use his time and talents in prosecuting a particular profession or trade, when its enforcement would obviously or probably be attended with these injurious consequences. But it must not be forgotten that the community has a material interest in maintaining the rules of fair dealing between man and man. It suffers far greater injury from the infraction of these rules than from contracts in restraint of trade.

I think it is now generally conceded that it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. That object could not be accomplished if, upon the score of public policy, the law reserved to the seller an absolute and indefeasible right to start a rival concern the day after he sold. Accordingly it has been determined judicially, that in cases where the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him, within bounds which having regard to the nature of the business are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy, and is therefore capable of being enforced. Whether—when the circumstances of the case are such that a restraint unlimited in space becomes reasonably necessary in order to protect the purchaser against any attempt by the seller to resume the business which he sold—a covenant imposing that restraint must be invalidated by the principle of public policy is the substance of the question which your Lordships have to consider in this appeal.

The earlier decisions, which were chiefly, if not exclusively, by the Courts of Common Law, contain abundant dicta, which, if literally followed, would sustain the plea upon which the appellant relies. These dicta broadly state the rule to be that a general restraint of trade, or, in other words, a restraint unlimited as to space, is void, because it is contrary to the commercial policy of England. The same proposition is frequently to be found in the later common law cases. To me it seems very natural that the law should have been laid down in these broad terms. The rule of policy, as originally understood and administered, struck at all restraints, whether partial or general. It was relaxed, by these decisions, in the case of partial restrictions, which were held to be reasonable. I feel that, had I occupied the seat of the learned judges who pronounced them, I should probably have used the same language which they employed with reference to unlimited restraints. They never imagined that any business could attain such wide dimensions that it could not be reasonably protected from the invasion of the seller except by subjecting him to a restraint unlimited in space. I am under the impression that, had they conceived the possibility of such a case occurring, the rule would have been expressed in somewhat different terms. I think that, as stated, it was meant to involve the assumption that there could be no such case.

A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country in relation to, and for promoting the interests of, its commerce must, as time advances and as its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its Courts. In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy.

Their function, when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time. When that rule has been ascertained, it becomes their duty to refuse to give effect to a private contract which violates the rule and would, if judicially enforced, prove injurious to the community.

No one of the noble and learned Lords before whom this appeal was heard has had the least difficulty in holding that the injunction granted was reasonably necessary in order to protect the respondent company's business from the aggressive acts threatened and commenced by the appellant. Nor, so far as I understand, have noble and learned Lords had any hesitation in coming to the conclusion, with the learned judges of the Appeal Court, that there is no existing rule of public policy which can be effectively pleaded in bar of the injunction. For my own part, I am very clearly of opinion that no violence is done to the canon laid down by the Common Law Courts in affirming that a restraint which is absolutely necessary in order to protect a transaction which the law permits in the interest of the public ought to be regarded as reasonable, and cannot, in deference to political ideas which are now obsolete, be regarded as in contravention of public policy. Were it necessary, I should be prepared to affirm that, in the year 1888, there was not, and that there does not now exist, any imperial rule of policy which requires that a restraint having that effect only shall be treated as a nullity, because it is unlimited in space, in circumstances such as occur in the present case. I venture to doubt whether it be now, or ever has been, an essential part of the policy of England to encourage unfettered competition in the sale of arms of precision to tribes who may become her antagonists in warfare. I also doubt whether at any period of time an English Court would have allowed a foreigner to break his contract with an English subject in order to foster such competition.

When the series of cases, from the earliest to the present time, are carefully considered, I think they will be found to record the history of a protracted struggle between the principle of common honesty in private transactions, on the one hand, and the stern rule which forbade all restraints of trade on the other. In my opinion it does not admit of dispute that the ancient rule has had the worst of the encounter, and has been gradually losing ground in all the Courts. I do not think that, between the Courts of Common Law and Equity, there has been much, if any, real difference of opinion. But I am bound to say that the language used by equity judges is on the whole more in consonance with the commercial policy of the country than some of the favourite dicta of the common law Courts. I purposely say some of those dicta, because I find in the opinions of many common law judges of the highest eminence a clear and liberal recognition of the wider views of policy, which have influenced your Lordships in the decision of this appeal.

The Lords Justices were agreed, and I understand that your Lordships are also agreed, as to the result of this case. A controversy has arisen as to the principle upon which that result ought to be reached. To my mind, it is not a matter of practical importance whether the admission of a restraint, unlimited in space, be regarded as a novel exception from the general rule which forbids all restraints, or as an extension of the exception upon that rule which has admitted limited restraints. I have no desire to interfere with anybody's freedom of choice between these alternatives. I am content to state that, in my opinion, the judgment which your Lordships are about to pronounce goes no farther than to adapt to new circumstances an old and sound exception to the general rule.

LORD ASHBOURNE :—

My Lords, I concur in the judgment moved by the Lord Chancellor.

The sole question is, whether the covenant referred to is void, or whether it is capable of being enforced against the appellant. I think it is quite clear that the covenant must be taken as entered into in connection with the sale of the goodwill of the appellant's business, and that it was entered into with the plain and bonâ fide object of protecting that business.

The appellant has argued that he is not bound by the covenant, and that it is void, as being opposed to public policy, and, being general, unrestricted as to area.

The cases that have been referred to are interesting and important as shewing the history, growth, and development of an important branch of our law. In considering them it is necessary to bear in mind the vast advances that have since the reign of Queen Elizabeth taken place in science, inventions, political institutions, commerce, and the intercourse of nations. Telegraphs, postal systems, railways, steam, have brought all parts of the world into touch. Communication has become easy, rapid, and cheap. Commerce has grown with our growth, and trade is ever finding new outlets and methods that cannot be circumscribed by areas or narrowed by the municipal laws of any country. It is not surprising to note that our laws have been also expanded, and that legal principles have been applied and developed so as to suit the exigencies of the age in which we live.

The appellant practically seeks to ignore the altered conditions of to-day, and to rely upon a rigid application of what he conceives to be the meaning of some decisions given in other generations, and this without taking note of the facts of the cases or of the conditions of the time when they occurred.

His argument practically is that his covenant is in general restraint of trade, and that if it be so—regardless of whether it is reasonable, whether it only affords a fair protection to his covenantees—it must be held to be void.

In the early times all agreements in restraint of trade were discountenanced; but by degrees, as the exigencies of an advancing civilization demanded, this was found to be too rigid, and our judges considered in each case what was reasonable and necessary to afford fair protection. This is apparent in the important judgment of Lord Macclesfield in *Mitchel* v. *Reynolds* (1). That was the case of a partial restraint of trade, and the judgment referred to the great distinction between a covenant in general restraint of trade and such a covenant as he was then dealing with. According to the then state of English life, it

(1) 1 P. Wms. 181.

would be hard to conceive that a covenant in general restraint of trade could ever be reasonable, and no imagination could then conceive that it could ever be needed for the fair protection of any one. It is easy to understand how a distinction for convenience came to be thus expressly noted between general and partial restraints of trade. Tindal C.J., in *Horner* v. *Graves* (1), points out, in reference to this judgment of Lord Macclesfield: "The Lord Chief Justice says 'a restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good,' which are rather instances and examples than limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to a particular case."

Reference to this judgment of Lord Macclesfield and to this distinction between covenants in general and partial restraint of trade is found naturally in numerous cases. It appeared to afford a convenient nomenclature, and to be probably suited for some cases; but I respectfully concur with Tindal C.J. in the words already quoted, that these covenants were not "limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to a particular case."

I do not know that there is a single reported case, whose facts are clearly known, where a covenant in general restraint of trade, clearly reasonable in itself and only affording a fair protection to the parties, has been held to be void. One can readily see that such covenants might be extravagant and unnecessary, quite unreasonable, and not at all required for fair protection, and then the fact that they were general and not partial would be a distinction entitled to great weight. Thus I can well understand the existence of the distinction being kept alive and noted in so many cases, though this would not at all imply or require that the reasonableness of a covenant and the fact that it only afforded fair protection should ever be put aside or ignored.

In former days the arguments used shewed how different was the circumstances of those times. Discussions are to be found as to ten-mile limits, and fifty miles, and as to the distances of

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(1) 7 Bing. 735.

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one English town from another—then considerable topics, but now often trivial having regard to present means of locomotion. The cases shew a great variety of circumstances, different professions and trades, cases of apprenticeship and sales of goodwill. Each case has had to be considered on its own facts. It is really impossible to divide all cases into the two categories of covenants in general and partial restraint of trade requiring distinct treatment and needing different policies. However it is accomplished, the law must work in harmony with the requirements of the times and must advance and develop with the growth of our national life and institutions. Whether there ever was an effective and acknowledged rule, requiring all covenants in restraint of trade to be divided into two broad categories of general or partial restraint with the test of reasonableness openly and expressly applied to partial restraints, whilst it was ostensibly denied to general restraints, though in reality applied under the guise of an exception whenever the exigencies of life and business required it; or whether, assuming the rule to have been once known and recognised, it can now be accepted as applicable to the conditions of our present life; or whether all restraints upon trade have been always really governed by the one test, what is a fair protection and what is reasonable; are inquiries of interest on which legal minds may differ. I do not regard the distinctions of any practical importance, because, as in the present case, the inquiry as to the validity of all covenants in restraint of trade must, I am disposed to think, now ultimately turn upon whether they are reasonable, and whether they exceed what is necessary for the fair protection of the covenantees. There may be differences of opinion as to the history of covenants in restraint of trade, as to distinctions from time to time taken in nomenclature, but I believe in the result there is no real difference of opinion, and that all your Lordships hold the covenant in the present case to be good and valid for reasons which do not very seriously differ.

I do not pursue the controversy suggested by Bowen L.J. as to the judgments of Lord Langdale, James V.C., and Sir Edward Fry in the three cases so often referred to; but, as will appear from what I have already said, I would find much difficulty in accepting all his criticisms, much as I respect his ability and research.

Lindley L.J. clearly in his judgment recognised the tendency of modern decisions, and said expressly the opinion "that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee" was "the doctrine to which the modern authorities have been gradually approximating."

Having regard to the facts of the present case, to the nature of the business, to the class and number of customers, I think the covenant reasonable and not larger than the protection of the respondents required. I do not see anything to lead to the conclusion that the covenant is injurious to the public interest. I entirely agree with the Lord Chancellor in the propriety and prudence of not saying a word which would imply that such an important topic was ignored or lost sight of.

I concur in the suggested judgment.

LORD MACNAGHTEN:—

My Lords, the appellant, Thorsten Nordenfelt, a Swedish gentleman of much intelligence, as his able address to your Lordships proved, and of great skill in certain branches of mechanical science, had established in England and Sweden a valuable business in connection with the manufacture of quick-firing guns. His customers were comparatively few in number, but his trade was world-wide in extent. He had upon his books almost every monarch and almost every State of any note in the habitable globe. In 1886 Mr. Nordenfelt sold his business to a limited company which was formed for the purpose of purchasing it. At the same time and as part of the same transaction he entered into a restrictive covenant with the purchasers intended to protect the business in their hands. In 1888 the purchasers transferred their business to the respondents, a limited company established with the object of combining the Nordenfelt business with a similar business founded by a Mr. Maxim. The transfer was made with the concurrence of Mr. Nordenfelt. Without his concurrence and co-operation it is plain that it would not have

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been made at all. On the occasion of the transfer, and as part of the arrangement, Mr. Nordenfelt entered into a restrictive covenant with the respondents. This covenant was in some respects wider, in others less wide, than the covenant with the original purchasers. But it was in lieu of, and in substitution for, that covenant, which of course would have been kept alive if Mr. Nordenfelt had declined to come into the new arrangement.

In these circumstances I think that the Court of Appeal were right in regarding the covenant which Mr. Nordenfelt entered into with the respondents as a covenant made upon the occasion of the sale of his business, and as depending for its validity upon the principles and considerations applicable to such a case.

The stipulation was that Mr. Nordenfelt should not, during the term of twenty-five years from the date of the incorporation of the company, if the company should so long continue to carry on business, "engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns, gun-mountings or carriages, gunpowder explosives or ammunition"—so far the covenant has been held good; then come the words, "or in any business competing or liable to compete in any way with that for the time being carried on by the company." A proviso was added to the effect that such restriction should not apply to explosives other than gunpowder, or to subaqueous or submarine boats or torpedoes, or castings or forgings of steel or iron, or alloys of iron or of copper. The latter part of the covenant, which extends to all competing businesses, may be disregarded. In view of the manifold objects of the company, as set out in their memorandum of association, it was held by the Court of Appeal to be void; and there is no appeal from that part of the decision. The proviso also, I think, may be put aside. It is one of the circumstances to be taken into consideration as bearing upon the question of the reasonableness of the agreement; but it is not, I think, essential to the validity of this covenant.

Mr. Nordenfelt admittedly has broken the earlier part of the covenant. His contention is that the whole covenant is void in law as being a covenant in restraint of trade unlimited in space. And the only point which your Lordships have to decide is whether that part of the covenant which the appellant has broken is valid. For it cannot be disputed that the covenant is severable, and that part may be good though part be void.

The learned judges of the Court of Appeal have come to the conclusion that the earlier part of the covenant is valid. But though they all arrive at one and the same result, they approach the question from somewhat different points of view.

Lindley L.J. expressed his opinion that the doctrine "that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee" was "the doctrine to which the modern authorities have been gradually approximating." But he could not, he said, "regard it as finally settled, nor, indeed, as quite correct." He thought it ignored "the law which forbids monopolies and prevents a person from unrestrictedly binding himself not to earn his living in the best way he can." In the particular circumstances of the present case he considered that the earlier part of the covenant was not contrary to public policy. Apart from public policy, he thought it reasonable, not being wider than was "reasonably necessary for the protection of the interests of the covenantee."

The late Lord Bowen considered that it was the established common law doctrine,—a rule to be gathered from the books "with perfect ease," though certain equity judges had ignored the rule or misunderstood the law—that in the case of contracts in general restraint of trade the Courts had nothing to do with the reasonableness of the transaction. That was an inquiry which appertained only to partial restraints. Contracts in general restraint of trade he defined as "those by which a person restrains himself from all exercise of his trade in any part of England." "Scores of cases," he added, "have proceeded on this basis, and those who dispute the rule can only do so, as it seems to me, by disregarding the judgments and opinions of an uncounted number of unanimous common law judges." But then he thought that the rule, being a rule based on reason and policy, might admit of exceptions; and treating the present case as an exception, he, too, thought the agreement limited to the first part of the covenant reasonable in itself and not contrary to public policy.

A. L. Smith L.J. came to the same conclusion, thinking that there was no hard-and-fast rule "that every covenant in restraint of trade is ipso facto void if it is unlimited as to space," and being apparently of opinion that the restraint in the present case, though unlimited in space, might yet be regarded as partial owing to the circumstance that certain trades, or branches of trade, in which the appellant had been engaged were reserved to him by the proviso attached to the covenant.

No doubt it is one thing to say that all exceptions to the general rule that the policy of the law is against restraints of trade are referable to one and the same principle, and that the only true test is, what is a reasonable restraint in the particular case. It is another thing to say that restraints of trade are divisible into two distinct categories—partial restraints and general restraints—that reasonableness is a test applicable to partial restraints and inapplicable to general restraints, but that the rule admits of exceptions; and that when you have found an exceptional case, you may apply to it the very same test which is applicable to partial restraints. There is a distinction certainly. But whether there is a substantial difference it is perhaps unnecessary to inquire. Assuming the rule to be that general restraints are void as being contrary to public policy, and not on any other ground, an exception must surely arise, if exceptions are admissible at all, as soon as you find that the particular case under consideration is not contrary to public policy, and so not opposed to the principle on which the rule is founded.

Thinking, as I do, that the distinction, if it exists, is of no practical importance, I should have been content with expressing my concurrence in the result at which the Court of Appeal have arrived, if it had not been for certain passages in the very able and elaborate judgment of the late Lord Bowen, from which I respectfully dissent.

Having laid down what he considers to be the common law rule, Lord Bowen proceeds to observe that "the first cloud upon the clear sky of the common law narrative comes in the equity decision of Lord Langdale in *Whittaker* v. *Howe* (1841) (1),"—a decision to which he applies the word "inexplicable." "Everything," says Lord Bowen, "appears clear in the case except the judgment of the Court. The covenant was not a covenant in partial, but in general restraint of trade; and the restraint of trade being a general one, the Court had nothing to do with the reasonableness of the transaction; Lord Langdale, nevertheless, begins by stating that the question was whether the restraint intended to be imposed upon the defendant was reasonable; and he cites as a guide for himself the words of Tindal C.J. in *Horner* v. *Graves* (2)." Then, after pointing out that *Horner* v. *Graves* (2) was a case of limited restraint, Lord Bowen adds, "Lord Langdale thus appears to miss the whole point of the common law classification, and treats the matter before him in the wrong category." Dealing with the judgment of James V.C. in the *Leather Cloth Company* v. *Lorsont* (3), Lord Bowen says that his "language seems calculated in several passages to confuse, and not to throw light upon our conceptions of the established common law doctrine." "The Vice-Chancellor's expressions," he observes, "are at times coloured by the same kind of misapprehension of the common law as that which pervades the judgment of Lord Langdale in *Whittaker* v. *Howe* (1)." Observations of a similar kind are made in reference to the judgment of Sir Edward Fry in *Rousillon* v. *Rousillon* (4).

My Lords, this appears to me to be a very grave censure—graver, I think, than Lord Bowen could have supposed or intended—because in such cases it was undoubtedly the duty of equity to follow the common law. The province of the Court was to give effect to common law rights. If the covenant was void at common law, a Court of Equity would have erred grievously in attempting to enforce it by injunction. If the question had been doubtful, it would have been the duty of the Court, at least in the time of Lord Langdale, to leave the parties to their common law rights, or to take the opinion of a Court of Common Law, as was done in the case of *Bunn* v. *Guy* (5), and by Lord Langdale himself in the case of *Nicholls* v. *Stretton* (1).

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(1) 3 Beav. 383, 394.
(2) 7 Bing. 735, 743.
(3) Law Rep. 9 Eq. 345.
(4) 14 Ch. D. 351.
(5) 4 East, 190.

Criticism so unsparing seems to invite or provoke inquiry. One cannot do otherwise than test the ground at each step. I have read, I think, every reported case upon the subject, and I must say, with the utmost deference to Lord Bowen's opinion, that I cannot help thinking that Lord Langdale and James V.C. and Sir E. Fry have rightly apprehended the common law doctrine as it may be traced in the books, and as it is expounded by some of the leading authorities on the subject in modern times.

In the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy, and therefore void (*Colgate* v. *Bacheler* (2)). In time, however, it was found that a rule so rigid and far-reaching must seriously interfere with transactions of every-day occurrence. Traders could hardly venture to let their shops out of their own hands; the purchaser of a business was at the mercy of the seller; every apprentice was a possible rival. So the rule was relaxed. It was relaxed as far as the exigencies of trade for the time being required, gradually and not without difficulty, until it came to be recognised that all partial restraints might be good, though it was thought that general restraints, that is, restraints of general application extending throughout the kingdom, must be bad. Why was the relaxation supposed to be thus limited? Simply because nobody imagined in those days that a general restraint could be reasonable, not because there was any inherent or essential distinction between the two cases. "Where the restraint is general," says Lord Macclesfield, in *Mitchel* v. *Reynolds* (3), "not to exercise a trade throughout the kingdom," the restraint "must be void, being of no benefit to either party and only oppressive, as shall be shewn by-and-by." Later on he gives his reason. "What does it signify," he says, "to a tradesman in London what another does at Newcastle; and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." "Any deed," says Best L.C.J., in

(1) 7 Beav. 42; 10 Q. B. 346.

(2) Cro. Eliz. 872.

(3) 1 P. Wms. 181.

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Homer v. *Ashford* (1), "by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking in the kingdom, would be void, because no good reason can be imagined for any person's imposing such a restraint on himself."

The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities. But it is not to be supposed that that result was reached all at once. The law has changed much, even since *Mitchel* v. *Reynolds* (2). It has become simpler and broader too. It was laid down in *Mitchel* v. *Reynolds* (2) that the Court was to see that the restriction was made upon a good and adequate consideration, so as to be a proper and useful contract. But in time it was found that the parties themselves were better judges of that matter than the Court, and it was held to be sufficient if there was a legal consideration of value; though of course the quantum of consideration may enter into the question of the reasonableness of the contract. For a long time exceptions were very limited. As late as 1793 it was argued that a restriction which included a country town, and extended ten miles round it, was so wide as to be unreasonable. It was said, and apparently said with truth, that up to that time restrictions had been confined to the limits of a parish, or to some short distance, as half-a-mile. But Lord Kenyon, in his judgment, observed that he did not see that the limits in question were necessarily unreasonable. "Nor do I know," he added, "how to draw the line": *Davis* v. *Mason* (1). The doctrine that the area of restriction should correspond with the area within which protection is required is an old doctrine. But it used to be laid down that the correspondence must be exact, and that it was incumbent on the plaintiff to shew that the restriction sought to be enforced was neither excessive nor contrary to public policy. Now the better opinion is that the Court ought not to hold the contract void unless the defendant "made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion or that the public interest would be sacrificed" if the proposed restraint were upheld: *Tallis* v. *Tallis* (2).

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(1) 3 Bing. at p. 326.

(2) 1 P. Wms. 181.

To a certain extent, different considerations must apply in cases of apprenticeship and cases of that sort, on the one hand, and cases of the sale of a business or dissolution of partnership on the other. A man is bound an apprentice because he wishes to learn a trade and to practise it. A man may sell because he is getting too old for the strain and worry of business, or because he wishes for some other reason to retire from business altogether. Then there is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment.

When the question is how far interference with the liberty of an individual in a particular trade offends against the interest of the public, there is not much difficulty in measuring the offence and coming to a judgment on the question. The difficulty is much greater when the question of public policy is considered at large and without direct reference to the interests of the individual under restraint. It is a principle of law and of public policy that trading should be encouraged and that trade should be free; but a fetter is placed on trade and trading is discouraged if a man who has built up a valuable business is not to be permitted to dispose of the fruits of his labours to the best advantage. It has been said that if the restraint be general "the whole of the public is restrained"—a phrase not, I think, particularly accurate, or perhaps particularly

(1) 5 T. R. 118.

(2) 1 E. & B. 391, 412.

intelligible. It has been said that when a person is debarred from carrying on his trade within a certain limit of space he will carry it on elsewhere, and thus the public outside the area of restriction will gain an advantage which may be set off, as it were, against the disadvantage resulting to the public within the limited area. That is, perhaps, a just observation in a case of apprenticeship and cases of that sort; but it is, I think, rather a fanciful way of looking at the matter in the case of a sale of goodwill. Applied to that sort of case, it seems to me to be just one of those unrealities which tend to confuse this question. What has the public to hope in the way of future service from a man who sells his business meaning to trade no more? Is it likely that he will begin the struggle of life again working at his old trade or profession in some remote place where he has no interest and no connections? Is the possibility that he may do so a factor to be taken into consideration? Now, when all trades and businesses are open to everybody alike, it is not very easy to appreciate the injury to the public resulting from the withdrawal of one individual. When Lord Kenyon was pressed with an argument as to the injury to the public in Thetford that would result from denying them the services of a particular surgeon, he answered that the public were not likely to be injured by an agreement of this kind. "Every other person," he added, "is at liberty to practise as a surgeon in this town": *Davis* v. *Mason* (1). Then I cannot help thinking that there is a good deal of common sense in the way in which Lord Campbell looked at this question. A retired partner in the canvassing trade of a publishing business, being under a restrictive covenant, claimed the right to disseminate his publications within the area of restriction. He appealed to public policy. "It is clear," said Lord Campbell, "there would be evil if the law justified such a breach of contract; but it is by no means clear there would be any compensating good to the public from the publications intended by the defendant to be so made in violation of his promise to the plaintiff": *Tallis* v. *Tallis* (2). That, of course, is not decisive in itself. It is an element for consideration of more or less weight according to circumstances.

(1) 5 T. R. 118.

(2) 1 E. & B. 391, 413.

But Lord Campbell's observation serves to bring into contrast the two principles which have to be adjusted in all these cases—freedom of trade and freedom of contract.

Sir Edward Fry's view was that the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances in which such a prohibition has been unreasonable. Lord Bowen cites this passage, and meets it with the following question: "Is it not a truer view that the Courts have never, as a rule, even entered on the consideration of the circumstances of any particular case where the prohibition has been unlimited as to area?" That question seems to go to the root of the matter. May I venture to put it to the proof? Since the date of *Mitchel* v. *Reynolds* (1) how many cases have there been in which a general prohibition has come before a Court of Common Law for discussion or decision? So far as I can discover there are two, and two only—*Ward* v. *Byrne* (2) and *Hinde* v. *Gray* (3). In *Hinde* v. *Gray* (3) the point was disposed of during the argument, on the presiding judge observing that the particular covenant under consideration had been held invalid in *Ward* v. *Byrne* (2). That observation was repeated in the judgment, and nothing more was said. The covenant in question there was as little reasonable, though perhaps not quite so absurd, as the covenant in *Ward* v. *Byrne* (2). *Hinde* v. *Gray* (3), therefore, does not help one much. There remains the case of *Ward* v. *Byrne* (2). In that case an unlimited restraint was imposed on a coal merchant's clerk. When once he left his master's employment he was not for nine months to earn his daily bread anywhere as a coal merchant or a coal merchant's clerk, or in any capacity connected with the business of a coal merchant—an absurd and unreasonable stipulation, if ever there was one. The only wonder is, that when the case first came before the Court on an argument as to the construction of the covenant, the vice of the contract passed unnoticed. Afterwards there was a motion in arrest of judgment on the ground that the covenant was void. How was that application dealt with? Did the Court abstain from entering on the consideration of the particular circumstances? Why,

(1) 1 P. Wms. 181.

(2) 5 M. & W. 548.

(3) 1 Man. & G. 195.

the main, if not the only, ground of objection was the unreasonableness of such a restriction in the particular circumstances of the case. "This restriction," observes the Chief Baron, "extends to all parts of England, and to every species of engagement by which this person during that time could gain a livelihood by his trade. What protection could the plaintiff require to such an extent as this? Can it be supposed that the plaintiff's trade could be prejudiced by this man's entering into the service of a coal merchant in Scotland? The obligation which the defendant undertakes by his bond is that he shall neither be nor serve a coal merchant in any capacity for nine months. *That goes so far beyond what the plaintiff could require that it is an unreasonable restriction*: it is void on both grounds. It is against the principles and policy of the law as to any restraints on trade and the right of every man to be at liberty to struggle for his own existence in the exercise of any lawful employment; and it is beyond what is necessary for the protection of the plaintiff or what the justice of the case demands." Nothing can be plainer than the view of the Chief Baron: all restraints of trade, if there is nothing more, are regarded with disfavour by the law; this restraint is unnecessary and unreasonable. The judgment of Parke B. is, I think, substantially to the same effect; but it is so important that I shall reserve it for separate consideration presently. Gurney B. followed the same line of argument. "What is there," he asks, "in the trade of a coal merchant in London whose interests could be injured by any person setting up as a coal merchant or assisting another person in that trade at Exeter or York?" All these considerations, it will be observed, were wholly beside the point if there was in force a simple rule to the effect that the Court has nothing whatever to do with the reasonableness of the transaction in the case of general restraints.

There is no higher authority upon this subject in modern times than Tindal C.J. He had more to do with moulding the law on this head and bringing it into harmony with common sense than all the judges since Lord Macclesfield's time put together. You will hardly find any judgment in reference to restraint of trade delivered by any Court in England or America during the last sixty years in which some passage is not cited from some judgment of Tindal C.J. In *Horner* v. *Graves* (1) Tindal C.J. delivered the considered judgment of the Court. In the course of it he had occasion to refer to the passage in *Mitchel* v. *Reynolds* (2), which is supposed to be the origin, or at least the earliest embodiment of the doctrine, that a different principle applies to general restraints and partial restraints. "Parker C.J.," he observes, "says a 'restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good'; which are rather instances and examples than limits of the application of the rule, *which can only be at last, what is a reasonable restraint with reference to the particular case*." It is quite true that *Horner* v. *Graves* (1) was a case of partial restraint; but here we have Tindal C.J. dealing with the case of a general restraint as well as the case of a partial restraint. With both cases pointedly before him, and in reference to the one as well as to the other, he says that the only rule is, what is a reasonable restraint with reference to the particular case. I do not find that this passage has ever been questioned, nor is there in the books, so far as I can discover, any authority conflicting with it, except the judgment of Lord Bowen in the present case. It may, perhaps, be objected that passages are to be found in the judgments of Tindal C.J. as well as in the judgments of other judges, in which it is said that general restraints are void without adverting to any reason for their invalidity. That, no doubt, is so, and, indeed, in this very judgment there is such a passage. But is it not fair to conclude that Tindal C.J. thought general restraints bad, not because there was an arbitrary law to that effect—a hard-and-fast rule which judges had learned by rote, and the origin of which it was forbidden to explore—but because he took a general restraint to be an example, a typical example if you will, of an unreasonable contract? It does not seem to me to affect the question in the very least how often the dictum may be found repeated, if, on the one hand, it is not accompanied by any reason or explanation, and, on the other, it appears without any authoritative statement that the proposition had become a

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(1) 7 Bing. 735.

(2) 1 P. Wms. 181.

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rule which was neither to be questioned nor explained. It is merely a dictum after all, because there is no reported case, except, perhaps, *Ward* v. *Bryne* (1), in which it could have had any bearing upon the decision. Certainly it is no wonder that judges of former times did not foresee that the discoveries of science and the practical results of those discoveries might in time prove general restraints in some cases to be perfectly reasonable. When that time came it was only a legitimate development —it was hardly even an extension—of the principle on which exceptions were first allowed to admit unlimited restraints into the class of allowable exceptions to the general rule.

I would now turn to the judgment of Parke B. in the case of *Ward* v. *Byrne* (1), which was decided in 1839, eight years after the decision in *Horner* v. *Graves* (2). The learned judge begins by stating the circumstances of the case, and the leading principle laid down in *Mitchel* v. *Reynolds* (3), that the public have an interest in every person carrying on his trade freely. Then he cites as a guide for himself the words of Tindal C.J., in a case of limited restraint, the very thing for which Lord Langdale is so much blamed. He could not, he said, express the rule more clearly than it had been done by Tindal C.J. in *Hitchcock* v. *Coker* (4), where he says: "We agree in the general principle adopted by the Court of Queen's Bench, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." Oddly enough, that is a reproduction of the very passage which Lord Langdale selected as his guide; only he took it from *Horner* v. *Graves* (2) directly; Parke B. took it from the judgment on appeal in *Hitchcock* v. *Coker* (4). There it is attributed to Lord Denman, who does no more than quote the passage which Lord Langdale cites from *Horner* v. *Graves* (2). Then Parke B. observes, and he repeats the observation more than once, that there is no authority in favour of the position that there can be a general restriction limited only as to time.

(1) 5 M. & W. 548.
(2) 7 Bing. 735.
(3) 1 P. Wms. 181.
(4) 6 A. & E. 438.

He might, I think, have said with equal truth, that there was no case since *Mitchel* v. *Reynolds* (1) in which the question had come before the Court for consideration. In conclusion he says: "This case falls within *the rule laid down by Tindal C.J., viz., that this is a general prohibition from carrying on trade which is more extensive than the interests of the party with whom the contract is made can possibly require.* On that ground I think the judgment ought to be arrested." What did Parke B. mean there by the rule laid down by Tindal C.J.? There is no rule to be found laid down by Tindal C.J. in those words or to that effect except in the passage I have cited from *Horner* v. *Graves* (2). Parke B. may have been referring to *Horner* v. *Graves* (2), or he may have been referring to some opinion well known to him, though it is not to be found in any reported judgment. In either case that would be a strong confirmation of the argument I am endeavouring to present to your Lordships. But the argument seems to me to be irresistible if Parke B. thought that the rule as he expressed it, and as applied to a case of general prohibition, was fairly to be deduced from a similar rule laid down in a case of partial restraint.

With regard to Lord Langdale's judgment in *Whittaker* v. *Howe* (3), I have some difficulty in understanding what the objection to it is, even on the view which Lord Bowen takes in reference to partial and general restraints, unless his view was, as one passage in his judgment which has already been cited seems to indicate, that a restraint limited to England is to be considered as a general restraint nowadays when England is only part of the United Kingdom as much as it was when the three kingdoms were separate.

I cannot think that *Whittaker* v. *Howe* (3) requires much explanation. There is a homely proverb current in my part of the country which says you may not "sell the cow and sup the milk." That is just what Mr. Howe tried to do. He was a solicitor in large practice. He sold his business for a good round sum to two younger practitioners, and covenanted not to practise on his own account in England or Scotland. In order

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(1) 1 P. Wms. 181.

(2) 7 Bing. 735.

(3) 3 Beav. 383.

Lord Macnaghten.

to hold the business together his name was kept in the firm and he remained in the office, drawing a handsome salary. Then there was a quarrel; and he carried off surreptitiously all the papers he could lay his hands on; he set up in the immediate neighbourhood; and he tried to steal the business he had sold. His defence was that a covenant so wide was against public policy. But it did not occur to him to return the price: that he kept in his pocket. Lord Langdale thought the public would not greatly suffer if Mr. Howe withdrew for a time from the ranks of an honourable profession. I cannot think he was very wrong. It seems almost absurd to talk of public policy in connection with such a case. It is a public scandal when the law is forced to uphold a dishonest act: would the public find suitable compensation in the privilege of employing an unprincipled lawyer practising in violation of his solemn engagement? And it must be borne in mind that the firm remained, though one member retired into private life. Lord Langdale held, on the evidence before him, that the restraint was not unreasonable, although it extended to the whole of England and Scotland. Whether he was right or wrong in that view it is impossible to say without knowing what the evidence was. Undoubtedly some solicitors have correspondents in almost every business centre in the kingdom. At any rate, that particular point does not seem to have been contested in the argument, and it lay on the defendant to prove the area of restriction unreasonable. I venture to think that the decision in *Whittaker* v. *Howe* (1) was right. And, further, whether the restraint in that case ought to be regarded as general or as partial, I think the decision was in accord with the opinions of Tindal C.J. and Parke B. Nor can I, with all deference to Patteson J., understand how anybody could suppose that *Whittaker* v. *Howe* (1), in which the restraint was held to be reasonable, conflicts with *Ward* v. *Byrne* (2), where the restraint was plainly unreasonable and held to be so.

Now, in the present case it was hardly disputed that the restraint was reasonable, having regard to the interests of the parties at the time when the transaction was entered into. It enabled Mr. Nordenfelt to obtain the full value of what he had to sell; without it the purchasers could not have been protected in the possession of what they wished to buy. Was it reasonable in the interests of the public? It can hardly be injurious to the public, that is, the British public, to prevent a person from carrying on a trade in weapons of war abroad. But apart from that special feature in the present case, how can the public be injured by the transfer of a business from one hand to another? If a business is profitable there will be no lack of persons ready to carry it on. In this particular case the purchasers brought in fresh capital, and had at least the opportunity of retaining Mr. Nordenfelt's services. But then it was said there is another way in which the public may be injured. Mr. Nordenfelt has "committed industrial suicide," and as he can no longer earn his living at the trade which he has made peculiarly his own, he may be brought to want and become a burden to the public. My Lords, this seems to me to be very far-fetched. Mr. Nordenfelt received over £200,000 for what he sold. He may have got rid of the money. I do not know how that is. But even so, I would answer the argument in the words of Tindal C.J.: "If the contract is a reasonable one at the time it is entered into we are not bound to look out for improbable and extravagant contingencies in order to make it void": *Rannie* v. *Irvine* (1).

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(1) 3 Beav. 383.

(2) 5 M. & W. 548.

My Lords, for the reasons I have given, I think the only true test in all cases, whether of partial or general restraint, is the test proposed by Tindal C.J.: What is a reasonable restraint with reference to the particular case? I think that the restraint in the present case is reasonable in every point of view, and therefore I agree that the appeal should be dismissed.

LORD MORRIS:—

My Lords, I entirely concur in the judgment and the reasons for it given by the Lord Chancellor. But I desire to express my opinion that, without going through the numerous cases which have been so exhaustively dealt with in the Court of Appeal and by your Lordships, the weight of authority up to the present time is with the proposition that general restraints

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(1) 7 Man. & G. at p. 976.

Lord Morris.

of trade were necessarily void. It appears, however, to me that the time for a new departure has arisen and that it should be now authoritatively decided that there should be no difference in the legal considerations which would invalidate an agreement whether in general or partial restraint of trading. These considerations, I consider, are whether the restraint is reasonable and is not against the public interest. In olden times all restraints of trading were considered primâ facie void. An exception was introduced when the agreement to restrain from trading was only from trading in a particular place and upon reasonable consideration, leaving still invalid agreements to restrain trading at all. Such a general restraint was in the then state of things considered to be of no benefit even to the covenantee himself; but we have now reached a period when it may be said that science and invention have almost annihilated both time and space. Consequently there should no longer exist any cast-iron rule making void any agreement not to carry on a trade anywhere. The generality of time or space must always be a most important factor in the consideration of reasonableness though not per se a decisive test. If the consideration of reasonableness or of public interest is the rule, the appellant in my opinion has no case. The portion of his business which consisted of manufacturing guns and gunpowder explosives was one which would almost altogether be with Governments, foreign as well as at home, and wherever carried on would necessarily be in injurious competition with the respondents; nor does the substitution of a company for the appellant in the manufacture of guns and ammunition appear to me to injuriously affect the public interest.

Order appealed from affirmed and appeal dismissed.

Lords' Journals 31st July 1894.

Solicitors for appellant: *Munns & Longden.*
Solicitors for respondents: *Wilson, Bristows, & Carpmael.*

[HOUSE OF LORDS.]

H. L. (E.)
1894
June 19.

ISAAC FREER . . . . APPELLANT;

AND

MURRAY AND OTHERS . . . . RESPONDENTS.

Licensing Acts—Licence, Lapse of—Discretion of Justices to refuse Transfer—Licensing Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Wine and Beerhouse Act*, 1869 (32 *&* 33 *Vict. c.* 27), *ss.* 8, 19—*Wine and Beerhouse Act Amendment Act*, 1870 (33 *&* 34 *Vict. c.* 29), *s.* 7.

A licence for the sale of beer had been held for a house from a date before the 1st of May 1869 continuously down to the 10th of October 1891, when it expired, the tenant's application for a renewal having been refused in September. On the 9th of October 1891 a new tenant gave notice that he intended to apply, and on the 17th of November he did apply, to the justices in special sessions for a transfer of the licence under 9 Geo. 4, c. 61, s. 14:—

Held, affirming the decision of the Court of Appeal ([1893] 1 Q. B. 635), that under sect. 19 of the Wine and Beerhouse Act 1869 and sect. 7 of the Amendment Act 1870 the justices were not restricted to the four grounds of refusal specified in the Act of 1869, but had a general discretion; since the restriction applies only where there has been a licence in existence continuously from a date before the 1st of May 1869 down to the date of the application.

Reg. v. *Curzon* (Law Rep. 8 Q. B. 400) approved.

APPEAL from an order of the Court of Appeal (1) upon a case stated by Quarter Sessions.

On the 17th of November 1891 the respondents, being the justices in special sessions for Manchester, refused an application for the transfer of a licence under the circumstances stated in the judgment of Lord Herschell L.C.

On appeal by the present appellant the Quarter Sessions granted the transfer subject to a special case for the opinion of the Queen's Bench Division upon the following point, namely—

Was the licence in force on the 17th of November 1891 and had the same been granted by way of renewal from time to time so as to entitle Freer to the benefit of sect. 19 of 32 & 33 Vict.

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(1) [1893] 1 Q. B. 635.

c. 27, and sect. 7 of 33 & 34 Vict. c. 29, and to restrict the justices sitting in transfer sessions on that day to the four grounds of refusal set forth in the 8th section of 32 & 33 Vict. c. 27, or were they at liberty in dealing with Freer's application for the transfer of the licence to him to exercise a general discretion with reference to the granting or refusal thereof?

If the Court should be of opinion that the justices at the special sessions on the 17th of November 1891 were restricted to the said four grounds of refusal in dealing with Freer's application, then the decision was to stand and Freer's appeal to be allowed, but without costs, but if the justices were not so restricted but were at liberty to exercise a general discretion in dealing with the application, the decision was to be reversed and Freer's appeal dismissed, but without costs.

The Queen's Bench Division (Pollock B. and Vaughan Williams J.) refused to quash the order of Quarter Sessions (1).

The Court of Appeal (Lord Esher M.R., Lindley and Lopes L.JJ.) reversed that decision and quashed the order of Quarter Sessions (2).

June 15, 18, 19. Sir *E. Clarke* Q.C. and *Ambrose* Q.C. (*Pankhurst* with them) for the appellants:—

The question raised by this appeal has never before the present case been decided. Sect. 19 of the Wine and Beerhouse Act 1869 limits the grounds on which renewal can be refused. In 1871 an Act was passed—34 & 35 Vict. c. 88—which is in part declaratory of the Act of 1869. Sect. 3 of that Act removes a doubt which had arisen as to the extent of the justices' power to refuse an application for a certificate in the case of licences existing before the 1st of May 1869 where the licence or a certificate subsequent to the licence has ceased to be in force, and enacts that in the case of such an application the justices are not restricted to the specific reasons mentioned in the Act of 1869. The Act of 1871 was repealed by the Licensing Act 1872, and there is no re-enactment of this 3rd section of the Act of 1871. Thus the inference is that the restriction of the Act of

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(1) [1893] 1 Q. B. 281.

(2) [1893] 1 Q. B. 635.

1869 applies to an application for a certificate where the licence or certificate has been forfeited or run out or otherwise ceased to be in force. Under the Act of 1869 all that is necessary is to shew that the licence was in force on 1st of May 1869. By sect. 7 of the Wine and Beerhouse Act 1870, which to this extent is still in force, sect. 19 of the Act of 1869 is extended to licences granted by way of renewal. The Alehouse Act 1828 s. 14 provides for transfers and notice to be given of change of occupancy. By sect. 4 sub-sect. 5 of the Amendment Act 1870 the provisions of 9 Geo. 4 c. 61 and of the Acts amending it are made applicable to cases of change of occupancy and transmission of licences. The two Acts of 1869 and 1870 must be read together. The full benefit of these Acts would apply where a man had removed at the end of October and an application on behalf of another was made at the special sessions. This would be renewal. Notice was given on the 9th of October and the old licence was kept alive or in suspended animation by the notice. Although the time has expired the special sessions have jurisdiction to treat an application as one of transfer or renewal: Alehouse Act 1828 ss. 4, 14; Wine and Beerhouse Act 1869 s. 19; Licensing Act 1872 s. 74—definition of transfer. The words "in force" have not the meaning assigned to them by Lord Esher M.R. The case is governed by *Reg.* v. *Justices of Liverpool* (1) where it was held by the Court of Appeal that 9 Geo. 4 c. 61 s. 14 applied to a case in which the occupier had allowed the time to run out and that the justices had jurisdiction to grant a renewal. So in *Thornton* v. *Clegg* (2) an application precisely like the present was treated as a renewal. Thus the present case is within sect. 19 of the Act of 1869. That Act is remedial to that of 1828, and sect. 8, which restricts the justices to four grounds of refusal, applies to the Act of 1828, and the whole must be read together as a code. Sect. 19 of the Act of 1869 was intended to give a benefit to the house and a change of occupants does not matter. The 7th section of the Act of 1870, which extends the 19th section of the Act of 1869 to "licences granted by way of renewal . . . whether such licences continue to be held by the same person or have been or may be transferred to any other person or persons" applies. "May be" means "are capable of being."

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(1) 11 Q. B. D. 638.

(2) 24 Q. B. D. 132.

The word "licence" is often used in cases of renewal and transfer. This is in substance a transfer, though in form it may be a new licence. The Legislature intended to extend the jurisdiction originally applicable only to renewal in favour of the same person to cases in which the licence has been current up to the previous October, and the occupier has neglected or omitted to apply at the proper time. The licence in such a case is not dead: it is in a condition of suspended animation. There are two classes of sessions—first the annual licensing sessions, and secondly the sessions for transfers and renewals. Cases like the present have always been taken under the second head, and sects. 4 and 14 of the Act of 1828 must be read together as referring to transfers. If the justices had granted the application, as it is admitted they might have granted it, it would have been a transfer and not a new licence, because it would have taken effect at once, whereas a new licence needs confirmation by the licensing committee. *Hargreaves* v. *Dawson* (1) and *Reg.* v. *Curzon* (2) are clearly distinguishable because the licences were dead, there was no continuity of occupation and no application was made for a whole year.

Sir *R. E. Webster* Q.C. *Joseph Walton* Q.C. and *E. Sutton* for the respondents were not heard.

LORD HERSCHELL L.C.:—

My Lords, a licence for the sale of beer to be consumed on or off the premises had been continuously held for the Pheasant Inn, Charter Street, Manchester, prior to the occurrences to which I will call your Lordships' attention, from a period anterior to the 1st of May 1869. In the year 1891, and prior to that time, one John Faulkner had held the licence, and had obtained a licence from time to time in previous years. At the general annual licensing sessions held on the 27th of August 1891 an objection was made to the renewal of the licence to the house by the superintendent of police for the district, and the consideration of the objection was adjourned until the 10th of September 1891, on which day John Faulkner applied for a renewal of his licence, and that renewal was refused. Faulkner did not appeal from the refusal to renew, but on the 5th of October "removed from and yielded up possession of the house to Isaac Freer, who forthwith took possession and has ever since remained and still remains in possession thereof." On the 9th of October 1891 Freer gave notice of his intention to apply to the special sessions for a transfer of the licence, and in pursuance of that notice on the 17th of November 1891 he applied to the justices pursuant to the 14th section of 9 Geo. 4, c. 61. The justices refused the application upon the ground that there was no licence in force since it had expired on the 10th of October 1891, that they were therefore not limited to the four grounds of refusal specified in the Act of 1869, but were at liberty to exercise their discretion and consider the nature and requirements of the neighbourhood.

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(1) 24 L. T. (N.S.) 428.

(2) Law Rep. 8 Q. B. 400.

The question which arises is whether the justices were at that time entitled to exercise their discretion at large as to whether they would grant the application or not, or whether they had power to refuse it only on one of the four grounds mentioned in the statute of 1869.

My Lords, the 19th section of the Wine and Beerhouse Act 1869 provides that "where, on the 1st of May 1869, a licence under any of the recited Acts is in force with respect to any house or shop for the sale by retail therein of beer, cider or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider or wine to be consumed on the premises in respect of such house or shop except upon one or more of the grounds on which an application for a certificate under this Act in respect of a licence for the sale of beer, cider or wine not to be consumed on the premises may be refused." It is not necessary to trouble your Lordships with what those grounds are, because the sole question is whether that provision applied or not.

The language of that clause is certainly not very clear, and by the 7th section of the Wine and Beerhouse Act Amendment Act

1870 there was this further enactment in relation to it: "The 19th section of the principal Act shall extend to licences granted by way of renewal from time to time of licences in force on the 1st day of May 1869, whether such licences continue to be held by the same person or have been or may be transferred to any other person or persons."

My Lords, the construction which has been put upon the language used in those statutes is this, that in order to bring himself within the clause the applicant must shew that there was a licence in respect of the premises in force on the 1st of May 1869, and that there has been a renewal of such licence from time to time down to the time of the application. That was the construction put upon it by the Court of Queen's Bench in *Reg.* v. *Curzon* (1) by Blackburn, Quain and Archibald JJ. They expressed the opinion that if the licence had lapsed at any time prior to the application then the legislation to which I have referred did not apply.

My Lords, I confess I can entertain no doubt that, according to the proper construction of these sections, quite apart from authority, the meaning must be this, that the prohibition—or the limitation perhaps, I should rather say—of the free jurisdiction of the justices only applies where there was a licence in force on the 1st of May 1869, and where that licence has been renewed from time to time, so that it has been throughout and is in existence at the date of the application. If at any time subsequent to the 1st of May 1869 and prior to, or at the date of the application, there was not a licence in existence in respect of that house, it appears to me that sect. 19 is inapplicable.

Now in the present case the licence which had been granted to the occupant of the house in 1890 expired on the 10th of October 1891. The licence is granted for the year expiring on that date and no longer. The application was made on the 17th of November following. Therefore, that on the 17th of November there was no licence in existence in respect of that house and had been no licence for more than a month appears absolutely certain.

(1) Law Rep. 8 Q. B. 400.

The case of the appellant is founded upon the effect of 9 Geo. 4 c. 61 coupled with some words in sect. 7 of the Act of 1870, to which I have already called your Lordships' attention and to which I will again refer presently. The 4th section of the Act of Geo. 4 prescribes that in addition to the general licensing sessions there are to be certain special sessions, at which justices are empowered to license such persons intending to keep inns theretofore kept by other persons about to remove from such inns, as they shall in "their discretion deem fit and proper persons under the provisions hereinafter enacted." Those provisions are the provisions in sect. 14. Sect. 14 is designed, in part at all events, to enable a transfer to be obtained to another person of a current licence where the licensee dies, or by sickness or other infirmity is incapable of keeping an inn or becomes bankrupt. There are provisions also which enable application to be made at the special sessions where the occupier has wilfully omitted or neglected to apply at the general annual licensing meeting for a licence to continue to sell excisable liquors, and in other cases with which I need not trouble your Lordships.

In all the cases where the power is given under this or the previous section to the justices to grant a licence they are to grant a licence to sell liquors to be "drunk and consumed in such house, or the premises thereto belonging," but with this proviso, "that every such licence shall continue in force only from the day on which it shall be granted until the fifth day of April or the tenth day of October then next ensuing, as the case may be." In the present case, therefore, the justices to whom application was made on the 17th of November had no power to grant a licence which should be in any respect retrospective, or to carry the licence back to the day when the previous licence expired. Had they possessed such a power a different question might have arisen; but all they could have done was, on that 17th of November, to grant a licence from that day, the result of which would have been that, the previous licence having expired on the 10th of October, there would have been a period during which there was no licence to that house.

How does the appellant seek to bring himself within the provision which requires, for the operation of sect. 19, that the licence shall not only have been in force on the 1st of May 1869, but shall have continued to be in force by renewal down to the time of the application, which, as I have said, is the construction which has been put upon the enactment? It is suggested that because an application may be made to a special sessions under the 14th section of the Act of Geo. 4 for a licence, and because such licence is called a "transfer," therefore the previous licence may be regarded, not as dead, but as in a state of—I think the words of the learned counsel were—suspended animation; and that this condition of suspended animation, having regard to the provisions of the Act of Geo. 4, is sufficient to bring the case within the Act of 1869.

My Lords, I am unable to take that view; I think the licence was not in a state of suspended animation, but was dead and incapable of coming to life again, and that all that could be granted was a new licence, not one technically so called, but, if you like, a transfer within the language of the Licensing Acts, nevertheless not a licence which in any way revived the old licence, or bridged over the time after the old licence came to an end. There seems to me to be no difficulty in such a view. It may well be that the 14th section gives to a person who has possessed a licence a right to apply to a special sessions even after that licence has expired—a right which would not exist in the case of a house to which no licence had ever been attached, or which did not come within the particular categories enacted in sect. 14. But that does not seem to me to have any bearing upon the question whether, at the time of this application, the applicant brought himself within the statute of 1869.

My Lords, much reliance was placed upon the words in sect. 7 of the Act of 1870, "whether such licences continue to be held by the same person, or have been or may be transferred to any other person or persons." That seems to me merely to be introduced for this purpose, that if it be proved that the licence has been granted by way of renewal from time to time and been in force down to the date when the application is made, it shall not be an objection that it has not been strictly speaking a renewal under the renewal provisions, that it has been not always in the same hands, but transferred from time to time to different persons. But the condition of the whole seems to me to be this, that you must shew a licence in force on the 1st of May, and you must shew that that licence, by way of renewal or transfer, has been continuously in force down to, and is in force at, the date of the application. The words upon which so much stress has been laid, "or may be transferred," I am unable to construe in the way contended for by Mr. Ambrose. I think that the words "have been or may be transferred" merely refer to the dividing line of the time of the passing of the Act. Of course the legislation related to matters which had taken place prior to the passing of the Act. It was a section which was explanatory of and extended the Act of 1869. Therefore it was necessary to deal with what might have happened before the passing of the Act or what might happen after the passing of the Act; accordingly, the words are whether the licence "has been transferred"—that is, prior to the passing of the Act—or "may be transferred"—that is, after the passing of the Act—to some other person; but the words do not seem to me to bear the meaning contended for by the appellant.

For these reasons I move your Lordships that the judgment be affirmed and the appeal dismissed with costs.

LORD WATSON:—

My Lords, it was assumed in the Court of Appeal, and it does not appear to admit of dispute, that the present appellant had a good title to apply to the justices assembled at a special session, on the 17th of November 1891, for a licence to continue to sell excisable liquors on the premises in question until the 10th of October 1892. The provisions of sect. 14 of 9 Geo. 4 c. 61, which confer that right upon him, when taken per se, also give the justices an absolute discretion to grant or refuse his application without cause assigned.

By subsequent legislation, which is to be found in sect. 19 of the Wine and Beerhouse Act 1869, as amended by sect. 7 of the Wine and Beerhouse Act Amendment Act 1870, the absolute discretion committed to the justices by the statute of 1828 was, in certain cases, made subject to limitation. In these cases the justices have no power to refuse a licence, except upon one or other of four grounds which are specified in sect. 8 of the Act of 1869. The refusal by the justices of the appellant's application on the 17th of November 1891 was not based upon any of these grounds; and the special case before us discloses that none of these special grounds did in fact exist. Accordingly the only question which it is necessary to determine is this, whether the present case falls within that class of cases in which the discretion of the justices is limited by the Acts of 1869 and 1870. If it does, the justices exceeded their statutory power in refusing the appellant's application. If it does not, their decision is unimpeachable.

My Lords, I have had little difficulty in coming to the conclusion that the statutory limitation which has been imposed upon the discretion of the justices by sect. 19 of the Act of 1869, in combination with sect. 7 of the Act of 1870, has no application in any case where the licence granted to the preceding occupant of the premises has ceased to be "in force" before the justices sitting in special session are asked to grant a licence in terms of sect. 14 of the Act of 1828. The point appears to me to have been expressly decided by Lord Blackburn, with the assent of Quain and Archibald JJ., in *Reg.* v. *Curzon* (1), and I have been unable to see any reason to differ from their ruling. In my opinion the appellant cannot succeed in this appeal unless he can satisfy your Lordships that the certificate granted to John Faulkner, which, as stated in the special case, expired on the 10th of October 1891, continued, notwithstanding its expiry, to be in force until the 17th of November following. The appellant's argument has failed to satisfy me upon that point; and I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD ASHBOURNE:—

My Lords, I concur.

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(1) Law Rep. 8 Q. B. 400.

H. L. (E.)
1894
FREER
v.
MURRAY.

LORD SHAND:—

My Lords, I also concur.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 19th June 1894.

Solicitors for appellant: *Crowders & Vizard, for Broadsmith & Stead,* and *Hockin, Raby, & Beckton, Manchester.*

Solicitors for respondents: *Collis & Mallam, for Cobbett, Wheeler, & Cobbett, Manchester.*

[HOUSE OF LORDS.]

H. L. (E.)
1894
July 30.

WILLIAM ROUSE . . . . APPELLANT;

AND

THE BRADFORD BANKING COMPANY, LIMITED . . . . RESPONDENTS.

Debtor and Creditor—Partnership Debt—Retiring Partner—Principal and Surety—Giving Time—Overdraft—Release of Surety.

Where two or more are indebted as principals and it is afterwards agreed between them that as between themselves one shall be a surety only, and this agreement is made known to the creditor, the rule as to the discharge of a surety by giving time to the principal debtor applies: see *Oakeley* v. *Pasheller* (4 Cl. & F. 207; 10 Bli. (N.S.) 548) and *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (Law Rep. 7 H. L. 348).

The appellant and others being in partnership a deed of dissolution was made whereby the appellant assigned his interest to the other partners, who covenanted with him to pay the partnership debts and to indemnify the appellant against them, with a proviso that he should not be entitled to require them to pay any of the debts so long as he was kept indemnified. Among the debts was an overdraft of £50,000 due to the respondents, a banking company. After the dissolution, the terms of which were made known to the respondents, a transaction was entered into between the new firm and the respondents whereby the new firm were allowed for a limited period to increase the overdraft to £53,000:—

Held, that there was under the circumstances no agreement to give time to the new firm or to alter the relation between the parties, and that the respondents had not released the appellant.

The decision of the Court of Appeal ([1894] 2 Ch. 32) affirmed upon the above ground. Quære, whether the proviso had the effect given to it by the Court of Appeal.

APPEAL from an order of the Court of Appeal (1).

The appellant brought an action against the respondent company, in which he was a shareholder, claiming a declaration that he was entitled to his shares free from any lien. The respondents counter-claimed for a declaration that they were entitled under their articles of association to a lien on the shares for a debt owing under the circumstances related in the judgment of Lord Herschell L.C. and in the report of the case below (1).

The question was whether the relation between the appellant and the respondents was that of principal debtor and creditor, or surety and creditor, and if the latter, whether the respondents had by their conduct released the appellant. Kekewich J., holding that the relation was that of surety and creditor and that the respondents had released the appellant by giving time to the principal debtors, dismissed the counter-claim and made the declaration claimed by the appellant.

The Court of Appeal (Lindley and A. L. Smith L.JJ., Kay L.J. dissenting) reversed that decision, dismissed the action, and declared that the respondents were entitled to a lien for the debt (1).

The decision of the Court of Appeal was based upon the terms of a proviso for indemnity in a deed of dissolution between the appellant and his partners. The decision of this House was, as will be seen, based upon their Lordships' opinion that in fact time had not been given to the principal debtors. Their Lordships' view of the facts, which appears in the judgments, makes it unnecessary to refer further to the proviso.

July 23, 30. *Cozens-Hardy* Q.C. and *Renshaw* Q.C. (*Frederic Thompson* with them) for the appellants:—

Upon the point of law as to giving time to the principal debtor, *Oakeley* v. *Pasheller* (2) is conclusively in the appellant's favour. Page Wood V.-C. in *Oakford* v. *European and American Steam Shipping Company* (1) interpreted that case to mean that an agreement between two debtors that one should be the principal debtor and the other the surety might affect the rights of the creditor. A similar view is expressed in *Maingay* v. *Lewis* (2) and in the *Oriental Financial Corporation* v. *Overend, Gurney & Co.* (3). Lord Hatherley's judgment in that case was affirmed in the House of Lords, and his view of the effect of *Oakeley* v. *Pasheller* (4) was ratified by Lord Cairns L.C. (5); and see *Wilson* v. *Lloyd* (6) (Bacon V.-C.). It was not till *Swire* v. *Redman* (7) that a different view was expressed. In that case Blackburn J. at p. 542 speaks of the doctrine as "consistent neither with justice nor common sense": and distinguished the case before him from *Oakeley* v. *Pasheller* (4); but he had not before him the report of the *Oriental Bank Corporation* v. *Overend, Gurney & Co.* (8) in the House of Lords; and he seems to have forgotten the Mercantile Law Amendment Act 1856 s. 5; and in *Bailey* v. *Edwards* (9) Blackburn J. himself expressed a different view from that which is implied in *Swire* v. *Redman* (7). The transaction for an increased overdraft was a binding agreement to give time to the new firm, which released the appellant as a surety.

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(1) [1894] 2 Ch. 32.

(2) 10 Bli. (N.S.) 548, 576; 4 Cl. & F. 207.

Finlay, Q.C. and *Vernon Smith* (*B. C. Gardiner* with them) for the respondents:—

There was no such grant of further time as would discharge the surety. There was no binding contract to extend the time for repaying the bank's advances. The respondents might be bound to honour cheques to the extent of £53,000, but were not precluded from requiring payment at any time; there was no covenant not to sue.

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(1) 1 H. & M. 182, 190.

(2) Ir. Rep. 3 C. L. 495; 5 C. L. 229, 233.

(3) Law Rep. 7 Ch. 142; 41 L. J. (Ch.) 332.

(4) 10 Bli. (N.S.) 548; 4 Cl. & F. 207.

(5) Law Rep. 7 H. L. 348, 360.

(6) Law Rep. 16 Eq. 60.

(7) 1 Q. B. D. 536.

(8) Law Rep. 7 H. L. 348.

(9) 4 B. & S. 761, 772; 34 L. J. (Q.B.) 41.

Oakeley v. *Pasheller* (1) has not the effect contended for by the appellant: it was rightly interpreted by A. L. Smith L.J.

Cozens-Hardy in reply cited *Moule* v. *Garrett* (2).

Lord Herschell L.C.:—

My Lords, the appellant, who was the plaintiff in the action, was formerly in partnership with certain other persons carrying on business as worsted spinners under the firm of William Rouse & Co. The partnership between them was dissolved by a deed of the 17th of April 1885. By that deed William Rouse was to cease to carry on the business, and the other members of the firm, John Frederick Rouse, Frank Rouse and Herbert Rouse, were to continue to do so. By that deed also the debts of the firm were to be paid by the new partnership, who were to take over its assets, and they covenanted with William Rouse, the retiring partner, to indemnify him against those debts. The covenant contained a proviso to which I will call attention presently.

My Lords, at the time of the dissolution, amongst the debts owing was a debt of upwards of £50,000 to the Bradford Banking Company, in which the appellant was a shareholder. At the time when the new firm failed, some years afterwards, the debt had been reduced below £50,000, but a considerable amount was still owing to the bank, and this action having been brought to establish the appellant's claim to his shares free from any lien, the respondents sought by counter-claim to enforce their right to hold William Rouse's shares as security for the debt. The answer to this claim was that William Rouse had been discharged from all his liability to the bank by reason of transactions between the bank and the new firm. The case was put in this way: that upon the dissolution of the firm under the deed which I have mentioned the continuing partners became as between themselves the principal debtors, and William Rouse merely a surety for them; and that inasmuch as the bank had notice of the deed of dissolution and its terms, it was brought to the knowledge of the bank that this was the relation of the

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(1) 10 Bli. (N.S.) 548; 4 Cl. & F. 207.

(2) Law Rep. 5 Ex. 132.

Lord Herschell, L.C.

parties after that date. Then it was said that the bank thus knowing that William Rouse had become surety only as between him and his former co-partners, gave time to the continuing members of the firm for the payment of the debt in question, and so discharged William Rouse. It was contended indeed alternatively, that there had been a novation, and that the bank had accepted the new firm as their debtors in place of the co-debtors who had previously been liable to them, and that, by this novation, William Rouse was discharged. That argument has not found favour with any of the learned judges before whom the case has come, and your Lordships have already intimated that, in your opinion, it cannot be supported.

My Lords, with regard to the question whether time was given so as to discharge the surety, the general principle of equity was not contested that where there is a contract with two persons, one as principal and the other as surety, and time is given to the principal without the assent of the surety, and without the rights against the surety being reserved, the right against the surety is extinguished; but it was said to be inapplicable to such a case as the present where those who as between themselves became principal and surety had been originally both of them principal debtors to the creditor.

On the other hand, it was contended that this made no difference and that the rule of equity was as applicable to a case where two having both been principal debtors, one afterwards became, with notice to the creditor, a surety, as it was to a case where the contract with the creditor was one of principal debtor and surety. Reliance was placed for this proposition upon the case of *Oakeley* v. *Pasheller* (1) decided in this House. That case has been very much discussed, and inasmuch as I believe all your Lordships have formed a clear opinion upon the argument which has been addressed to you on that point, it is probably well to express it, although the decision in this House does not turn upon the conclusion arrived at with regard to *Oakeley* v. *Pasheller* (2).

In *Oakeley* v. *Pasheller* (2) Lord Lyndhurst, in delivering judgment, said this: "Now in consequence of an arrangement which took place between the representatives" (that is the representatives of the deceased partner) "and the new partnership" (in that case an additional partner was taken in when one of the partners died) "they stood in the character of sureties; and the principle of law is this, that where a creditor gives time to the principal, there being a surety, without any communication with the surety, and without the consent of the surety, it discharges him from liability because it places him in a new situation and exposes him to risk and contingencies which he would not otherwise be liable to." The proposition is there laid down in terms quite unequivocal by Lord Lyndhurst affirming Lord Brougham as Lord Chancellor and the Master of the Rolls.

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(1) 4 Cl. & F. 207; 10 Bli. (N.S.) 548.

(2) 10 Bli. (N.S.) 548, 590.

My Lords, it was suggested, in the case of *Swire* v. *Redman* (1), that the judgment in *Oakeley* v. *Pasheller* (2) turned upon the fact that the creditor had been a party to an arrangement by which the representatives of the deceased partner were, as between him and them, to be sureties only. I cannot myself find any trace of such an arrangement as being the foundation, in any respect, of the judgment of Lord Lyndhurst.

In the case of *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (3) before Lord Hatherley when Lord Chancellor, he referred somewhat elaborately to the facts in *Oakeley* v. *Pasheller* (2) and he said: "There is really in substance no hardship; and that is one reason why I dwelt at some little length to shew that it was not a doctrine which was at all shaken by the right of the creditor to preserve his remedies against the surety; and if there was any small hardship they could have freed themselves from that hardship and all difficulty whatever. A person comes and tells them that since the debt was contracted circumstances have arisen by which he is in fact surety and the other debtor is the principal debtor. Thereupon all that they have to do is to give the principal debtor time and reserve their rights against the surety." It is quite clear, from the language used in the earlier part of the judgment, that Lord Hatherley considered he was really following the principle laid

(1) 1 Q. B. D. 536.

(2) 10 Bli. (N.S.) 548, 590.

(3) Law Rep. 7 Ch. 142; 41 L. J. (Ch.) 332, 336.

down in *Oakeley* v. *Pasheller* (1). The case of *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (2) was this: that two persons had appeared to the creditor, at the time the contract was entered into, to be both principal debtors, and he afterwards obtained notice of the fact that one of them was a surety only. It was held that when once he had received that notice he could not give time to the one who, as between themselves, was the principal debtor, without discharging the surety.

My Lords, that case came before this House on appeal from the decision of Lord Hatherley as Chancellor, and the judgment was affirmed. Lord Cairns said (3): "My Lords, it appears to me that after the case which was referred to at the Bar, decided by your Lordships' House, of *Oakeley* v. *Pasheller* (1), it is impossible to contend if after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under those circumstances the rule as to the discharge of the surety does not apply." That is a distinct and clear expression of opinion as to the limits and the grounds of decision in *Oakeley* v. *Pasheller* (1), and it is in accordance with the view which I have myself formed of that case. And in this House, as I have said, the decision of Lord Hatherley was affirmed, and therefore the proposition was actually applied in a case where the two debtors had both been believed to be principal debtors by the creditor at the time the contract was entered into.

My Lords, I own I am quite unable to see any distinction, even if *Oakeley* v. *Pasheller* (1) did not exist, between that case in the House of Lords and the present. If, notwithstanding that both the debtors appeared to be principal debtors, the knowledge afterwards that one of them is a surety only disentitles you to deal with the other in the way of giving time without discharging that debtor, then it seems to me it must equally be the case (for otherwise there would be a distinction, resting on no intelligible or solid basis), that where, although

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(1) 10 Bli. (N.S.) 548, 590. (2) Law Rep. 7 Ch. 142; 41 L. J. (Ch.) 332, 336.

(3) Law Rep. 7 H. L. at p. 360.

H. L. (E.)
1894
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COMPANY.
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both are principal debtors at the time, one of them afterwards, as between himself and his co-debtor, becomes a surety, that one is discharged if time be given to the other.

My Lords, so far I have expressed the opinion that on the point of law relied on, namely, that if it can be shewn that there was a giving of time to the new firm this would release the appellant, I think the case is made out, unless the proviso to the covenant of indemnity in the deed of partnership alters the rights of the parties. The proviso is that William Rouse "shall not be entitled to require payment of any of the said debts or sums of money hereinbefore covenanted to be paid by the said John Frederick Rouse, Frank Rouse, and Herbert Rouse" (the continuing partners) "so long as the said William Rouse, his heirs executors and administrators shall be indemnified according to the covenant last hereinbefore contained." My Lords, in the view taken by two of the learned judges in the Court below, the fact that this proviso was added to the covenant of indemnity prevented the ordinary doctrine applying to which I have been referring, inasmuch as, in the opinion of those learned judges, the fact of giving time would not have prejudiced any rights which William Rouse was possessed of, the proviso having by agreement between him and his co-partners limited those rights to an extent which would prevent his being prejudiced. My Lords, that is certainly a question of some gravity. I do not intend, because in the view that I take it is unnecessary, to express a decided opinion upon it, but I own that I should entertain great doubts and I should have to give further consideration to the question before I could give my assent to the proposition which has been the foundation of the view of two of the learned judges in the Court below.

My Lords, I come now to the question which of course lies at the root of the defence, whether it has been made out that the bank gave time to those who had become principal debtors. There are two transactions relied on for the purpose of establishing this. It was upon one of these that the learned judges in the Courts below pronounced judgment. It became unnecessary to consider the other because they came to the conclusion that the first of these did amount to a transaction by which there was

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an agreement to give time. My Lords, I cannot but think that some of the considerations which have been dwelt upon in your Lordships' House were not fully present to the minds of the learned judges in the Court below in dealing with this part of the case. Very little is said upon this question. It is somewhat summarily dismissed as being clear and free from difficulty that there was a binding agreement to give time.

Now we have no evidence as to what actually passed between the parties on the occasion when the suggested agreement was come to. It is of course obvious that time is only given within the meaning of the rule to which I have been referring if there is a binding agreement arrived at for good consideration. There was here no written agreement, and we are left to find out what the agreement was from a perusal of certain minutes of the bank with reference to the transaction; but of course those minutes can only be construed, and will only assist us to arrive at what the real bargain between the parties was, if we consider them in the light of the relation between the parties at the time when those minutes were made. We must look at their position before and after in order to understand the minutes and to arrive at any just conclusion as to what the parties intended to agree to, and did agree to.

Now the minute is in these terms: "1889. Feb. 16. Mr. John F. Rouse attended and submitted the balance-sheet of his firm up to 31st December last and made application for an overdraft of £53,046 until the 14th March (1)." Before saying anything upon those words, I think it is essential to see what arrangement for overdraft had existed, if any, prior to that date. A minute is put in of the 31st of December 1886 which is in these terms: "Resolved that the account of W. Rouse and Company may be for a short time in excess of the normal limit of £50,000 by £2000." That is the earliest of the minutes before us; but at the time of the dissolution there was an overdraft to an extent a little exceeding £50,000, that is to say in the time of the old firm. I have no hesitation in drawing the inference under those circumstances that there had been an agreed overdraft with the old firm, which was continued afterwards, for a limit of £50,000, and that that agreed overdraft with that normal limit was in existence on the 16th of February 1889 when this minute was made. What, then, is the meaning of "making application for an overdraft of £53,046 until the 14th of March"? It seems to me to be no more than this—an application that the agreed overdraft of £50,000 which had existed for many years should for a limited period of time be increased to £53,000. I do not think it was intended that the rights of the parties, whatever they were, as regards the £50,000 overdraft should be in any respect altered, or that the £53,000 overdraft so long as it existed should be an overdraft meaning anything else or on any other terms than those which had been applicable to the agreed overdraft of £50,000. Certainly I should be very much surprised if it was ever intended by the parties that supposing (which is the assumption of the appellant and which I will make for the purposes of this case) that prior to this agreement a writ might have been issued or a claim made for the £50,000 at any time, the right to claim or to sue for the £50,000 was to cease until the 14th of March because there was for that time to be an increase of the overdraft. I think it is manifest from the subsequent minutes that this £50,000 overdraft was regarded by both parties as continuing after the 14th of March. This is not a separate application for a single transaction of an overdraft of £53,000 for a certain time, because there was an overdraft before and there was an overdraft afterwards. It is obvious therefore that all that this transaction had relation to was an increase of that overdraft which began before and was continued afterwards, and was understood by both parties to be so. If that be the true view it seems to me to be conclusive that there was here no agreement to give time or to alter in any respect the relation between the parties, because in my judgment whatever could have been done in the way of enforcing any right to this £50,000 before the 16th of February continued just as much within the power of the bank after the 16th of February and down to the 14th of March, and indeed thenceforward.

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(1) The minute concluded by saying that upon certain conditions the application was granted.

It is not necessary to consider what the rights of the bank were with regard to their debtors when they had agreed to an overdraft. The transaction is of course of the commonest. It may be that an overdraft does not prevent the bank who have agreed to give it from at any time giving notice that it is no longer to continue, and that they must be paid their money. This I think at least it does; if they have agreed to give an overdraft they cannot refuse to honour cheques or drafts, within the limit of that overdraft, which have been drawn and put in circulation before any notice to the person to whom they have agreed to give the overdraft that the limit is to be withdrawn. That effect I think it has in point of law; whether it has more than that in point of law it is unnecessary to consider. Even if it has no greater effect in point of law it is obvious that neither party would have it in contemplation that when the bank had granted an overdraft it would immediately, without notice, proceed to sue for the money; and the truth is that whether there were any legal obligation to abstain from so doing or not, it is obvious that, having regard to the course of business, if a bank which had agreed to give an overdraft were to act in such a fashion, the results to its business would be of the most serious nature. It may be therefore that the parties simply contracted upon the basis of that state of things, that there was a legal right throughout for the bank at any time to sue for the money. But whatever the right was, it seems to me that that right was in no way diminished, but continued in full force and effect notwithstanding the arrangement of the 16th of February. That of course is sufficient to dispose of that part of the case.

It was asked by Mr. Renshaw what was the meaning then, if the bank might thus have sued, of saying that there was to be an overdraft until the 14th of March. My Lords, it had the effect I have just described—precisely the same effect as the previous overdraft had—that just as before they could not have refused to honour drafts, within the limit, drawn and put in circulation before they had given notice, so it appears to me that between that date and the 14th of March they could not refuse to honour drafts drawn within the greater limit, namely, up to £53,000, unless they had given notice that the overdraft would be withdrawn.

My Lords, it is not necessary to say whether this agreement was entered into for valuable consideration or not. If it was not, of course it must wholly fail; but inasmuch as I think there was no agreement to give time in the sense required, it is not necessary to inquire whether the minutes disclose a contract for valuable consideration or not.

So much for the first transaction. The second transaction arose in this way. At that time the limit had been reduced from £50,000 to £45,000. That took place on the 9th of April 1889 when there was a resolution, "That the limit of the account of William Rouse and Company for the future be £45,000." They had in August 1890 reached that limit and were anxious that certain bills should be met. The bills amounted to the sum of £18,000, and they were maturing at various dates from the 13th of August till the 18th of November 1890. The firm were very anxious that the bank should undertake to meet those bills. The bank were unwilling to do this without further security, inasmuch as it was beyond the £45,000 limit. Upon that an agreement was entered into by which two persons each became surety to the extent of £2500 to the bank, and in consideration of that the bank undertook that if Messrs. William Rouse & Co. paid into the bank before the 30th of September sums amounting to not less than £10,000, they would meet those bills. The security makes it clear that no part of it was given for the £45,000; it was only for such excess as there should be in the amount due from the firm to the bank over £45,000. The last clause is in these terms: "It is hereby agreed and declared that this guarantee and the liability of the surety thereunder shall absolutely cease and determine when and so soon as the balance owing by the said principals to the said company shall after the 18th day of November next be reduced to the sum of £45,000." No doubt it was in the contemplation of the parties that it would not be until the 18th of November that it would be reduced to the sum of £45,000. That was the limit; with that limit the bank were content; and this was an advance beyond that limit, and it was because they were advancing beyond the limit that they required this fresh security.

It seems to me that this entire agreement had relation only to this new advance, to this undertaking to meet those bills which

Lord Herschell, L.C.

were in excess of the limit, and that it was not intended by any of the parties to it that it should affect any of the rights which the bank possessed in relation to the sum within the limit, namely, £45,000. No security was given for that; the bank got nothing in respect of it; and it would be strange indeed if the bank getting nothing in respect of it because they entered upon greater liabilities, which greater liabilities alone were secured to them by any fresh security, it should be held that they gave up, or that they intended to give up, or that the debtor supposed that they gave up, any rights which they possessed in respect of the £45,000. For these reasons I think, on the construction of that document, the true conclusion as to the intention of the parties is, that upon that occasion also there was no binding agreement to give time as to this £45,000, which alone could establish the defence that the appellant sets up.

For these reasons I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

Lord Watson:—

My Lords, when two or more persons bound as full debtors arrange, either at the time when the debt was contracted, or subsequently, that, inter se, one of them shall only be liable as a surety, the creditor after he has notice of the arrangement must do nothing to prejudice the interests of the surety in any question with his co-debtors. That appears to me to be the law as settled by the judgments of this House in *Oakeley* v. *Pasheller* (1) and *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (2).

I am not prepared to affirm, upon the evidence before me, that the bank twice gave time to their debtors. In my opinion, all that they did on the first occasion was to substitute a wider for a narrower limit of overdraft during a specified period. But, save as to its amount, the overdraft was to remain in all respects the same as before. The terms upon which the balance due was recoverable underwent no alteration. On the second occasion there is still less ground for suggesting that time was given.

(1) 10 Bli. (N.S.) 548.

(2) Law Rep. 7 H. L. 348.

I think it right to state that as at present advised I am not prepared to assent to the view taken by two of the learned judges of the Appeal Court with regard to the effect of the proviso. Seeing that it has become unnecessary to decide the point, I shall not waste time in discussing it.

I therefore concur in the judgment which has been proposed by the Lord Chancellor.

Lord Ashbourne :—

My Lords, I entirely concur in the opinions which have been expressed by my two noble and learned friends who have already spoken.

Lord Macnaghten :—

My Lords, I concur.

Lord Morris :—

My Lords, I concur.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 30th July 1894.

Solicitors for appellant : *Field, Roscoe & Co., for Taylor, Jeffery, & Jessop, Bradford.*

Solicitors for respondents : *Patersons, Snow, Bloxam, & Kinder, for Gardiner & Jeffery, Bradford.*

[HOUSE OF LORDS.]

H. L. (E.)
1894
Aug. 2.

THE LONDON COUNTY COUNCIL . . APPELLANTS;

AND

THE ASSESSMENT COMMITTEE OF ST. GEORGE'S UNION IN THE COUNTY OF LONDON . . . . RESPONDENTS.

Poor-rate—Procedure—Valuation List—Appeal against Totals—Valuation of Property (Metropolis) Act, 1869 (32 *&* 33 *Vict. c.* 67), *s.* 32.

By sect. 32 of the Valuation of Property (Metropolis) Act 1869 "any body of persons authorized by law to levy rates or require contributions payable out of rates in the metropolis . . . . may appeal to the assessment sessions, if they feel aggrieved by reason (1.) of the total of the gross value of any parish being too high or too low; (2.) of the total of the rateable value of any parish being too high or too low." The London County Council, as such a body of persons, appealed to the assessment sessions against the totals of the gross and rateable values of a parish in the county of London on the ground that a large number of specified hereditaments in the parish were assessed below their true value:—

Held, affirming the decision of the Court of Appeal ([1893] 2 Q. B. 476), that assuming—but without deciding—that the London County Council were "aggrieved" within the meaning of sect. 32, there was nevertheless no right of appeal against totals upon the ground that particular hereditaments were assessed below their true value.

APPEAL against an order of the Court of Appeal (1).

The valuation list of the parish of St. George, Hanover Square, in the county of London, having been made in accordance with the Valuation (Metropolis) Act 1869 and finally settled by the respondents as the assessment committee, the appellants, as the successors of the Metropolitan Board of Works and as a body of persons authorized by law to levy rates or require contributions payable out of rates in the metropolis, appealed under s. 32 of that Act to the quarter sessions for the county of London, sitting as the general assessment sessions, against the totals of the gross and rateable values of the parish of St. George (shewn in the approved valuation list) as being too low, on the ground that a large number of hereditaments in the parish were assessed below their true value. The appellants alleged that they felt "aggrieved" by reason of the totals being too low; and they annexed to their case before the quarter sessions a schedule of more than 3000 hereditaments in the parish shewing the gross and rateable values thereof respectively, as fixed by the valuation list, and also what the appellants contended were the true gross and rateable values respectively, the increase of the gross values amounting in the aggregate to £260,076, and the increase of the rateable values to £200,134.

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(1) [1893] 2 Q. B. 476.

The Queen's Bench Division (Charles and Vaughan Williams JJ.) upon the application of the respondents ordered a writ of prohibition to issue prohibiting the justices for the county of London, sitting as the Court substituted by the Local Government Act 1888 for the general assessment sessions, from proceeding further in the appeal, upon the ground that the jurisdiction of the sessions had lapsed by time. The Court of Appeal (Lord Esher M.R., Bowen and Kay L.JJ.) affirmed that decision upon the ground that the appellants had no such right of appeal as was claimed (1).

The question whether the jurisdiction of the sessions had lapsed by time was not decided in this House and is not further noticed in this report.

May 8; June 25, 26. Sir *R. E. Webster* Q.C. and *Bosanquet* Q.C. (*Avory* with them) for the appellants:—

It is the duty of the County Council to issue precepts for county contributions to the several parishes, and to assess the contributions in proportion to the annual value. The valuation lists being the basis for the county rate, the County Council are "aggrieved" within sect. 32 when the totals of any parish are too low, since the parish escapes paying its due proportion to the county rate: see the County Rate Act 1852 and the Local Government Act 1888. Sect. 32 gives the right of appeal without any restriction or limitation as to the grounds, and if the

(1) [1893] 2 Q. B. 476.

limitation imposed by the Court of Appeal is maintained, a serious practical evil arises for which there is no redress. The valuation list lasts for five years, and during that time the mischief continues. Whole classes or rows of houses are sometimes rated too low. A whole parish may be inadequately assessed, or the principle applied may be wholly wrong. If this appeal does not lie the county contribution cannot be fairly adjusted. There is nothing in ss. 6, 8, 11, 14, 17, 20, 53, to shew that a right of appeal does not lie against totals upon the ground that particular hereditaments are rated too low.

In *Reg.* v. *Justices of General Assessment Sessions for the Metropolis* (1) it was held that where the appeal was against totals, the appellants were not bound to serve notice of appeal upon the occupiers of the hereditaments specified as rated too low. That decision governs the present case. See also *Reg.* v. *Edlin* (2) and *Reg.* v. *Guardians of Woolwich Union* (3).

Poland Q.C. (Sir *E. Clarke* Q.C. and *Danckwerts* with him) for the respondents was stopped.

Sir *R. E. Webster* Q.C. in reply.

The House took time for consideration.

Aug. 2. Lord Herschell L.C. (after stating the facts above given):—

My Lords, it is plain that the mere fact that certain hereditaments in a parish are undervalued does not prove that the total valuation is lower than it ought to be, for there may be other hereditaments in the parish which are as much overvalued. It was truly said that this would not afford ground for a prohibition. But I refer to it for the purpose of shewing that if the appellants' contention be well founded, and they are entitled to maintain that the totals are too low, because particular hereditaments were undervalued, it would necessarily involve an inquiry into and revision of the entire valuation of the parish. Moreover, if they are entitled to obtain an alteration of the totals by shewing that by reason of the undervaluation of particular hereditaments the totals ought to be increased, the effect upon the interests of individual ratepayers will be very serious. The increased total will involve a larger contribution from the parish for those purposes for which the county council and other bodies are entitled to require contribution, and which I will for convenience, though it is not strictly accurate, call extra-parochial purposes. It is admitted that though the totals were thus increased the valuation of the individual hereditaments must remain unaltered. The result will be that those whose hereditaments are undervalued will contribute less than their full share of the increased contribution due to the increase of the total, whilst those who are rated up to or above their value will have to pay more than their fair share of this contribution. And this state of things must continue without redress for a period of five years. When it is remembered that this consequence would flow from the decision of an appeal to which they were not and could not be parties, one cannot but be sensible of the injustice involved.

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(1) 17 Q. B. D. 394.

(2) 65 L. T. (N.S.) 83.

(3) [1891] 2 Q. B. 712.

Nevertheless, if the assessment of the hereditaments within a parish had been left by the Legislature to the parish officers, without control, it might be difficult to resist the conclusion that the Legislature had intended that those public bodies who were entitled to require a rateable contribution from all the parishes within their area should be at liberty to question the valuation of every hereditament in each of the parishes in order to ensure that the total of the several valuations was not less than it should be. I will therefore, before considering the terms of sect. 32 of the Metropolis Valuation Act 1869, upon the construction of which the case depends, call attention to the provision made for securing that the valuation list should exhibit values arrived at in the manner prescribed by law. The valuation list made by the overseers is to be submitted to an assessment committee who are to hear all objections made to it, and to revise the list in accordance with the Metropolis Valuation Act, and the Acts incorporated therewith. When they have finally approved it they are to "cause the totals of the gross and rateable value in such list to be ascertained and inserted in the list," and three members of the committee are to sign at the foot thereof "such declaration of approval and certificate of compliance" with the Act as is contained in the schedule. The certificate prescribed by the schedule is in these terms: "We do hereby . . . certify that in determining the gross and rateable value of the above hereditaments the provisions of the Valuation (Metropolis) Act 1869 have been complied with." These are no slight precautions for securing a valuation according to law. But it may be said that the bias of the assessment committee would be in favour of too low an assessment generally, as it would diminish the total, and therefore render the contribution of the parish to extra-parochial purposes less. This, however, is not true of the surveyor of taxes, who has also an important function to fill in relation to the list. His interest would be to see that the valuations are not lower than they should be, as this would diminish the sums which the occupier would have to pay to Imperial as distinguished from local taxation. By sect. 8 of the Act, the overseers are to send a duplicate of the list to the surveyor of taxes, and he is to insert in it "the amount in his opinion of the gross value of the hereditaments comprised in such list, where such amount differs from the amount inserted by the overseers," and to transmit the duplicate to the assessment committee. That committee have, therefore, his valuation before them. Moreover, by sect. 53, when a surveyor of taxes gives notice of objection or appeal, the amount specified in the notice as being in his judgment the gross value of any hereditament referred to is to be inserted in the valuation list by the assessment committee, special sessions, or assessment sessions, as the case may be, unless it is proved that such amount ought not to be so inserted. Add to this that ample power of appeal is given to every one interested against any decision of the assessment committee, and I think I have said enough to shew that great precautions have been taken to secure a proper valuation of the hereditaments situate in the several parishes throughout the metropolis. That these precautions are perfect it would be rash to assert; that errors may nevertheless creep in is certain. This, however, would probably be the case under any system of valuation.

I turn now to sect. 32, under which the appeal in question was presented to the sessions. It provides that (amongst others) "any body of persons authorized by law to levy rates or require contributions payable out of rates," may appeal to the assessment sessions if they feel aggrieved, by reason "of the total of the gross value of any parish being too high or too low," or "of the total of the rateable value of any parish being too high or too low." There can be no doubt that the appellants are a body authorized to levy rates or require contributions within the meaning of the section, and I will assume, without deciding it, that if the total is too low, they are "aggrieved"; but the question is, does the enactment authorize their seeking to correct the total by attacking the valuation of any number of the hereditaments within the parish? It is important to observe that this right, if it exists, is not confined to public bodies, such as the appellants; it is conferred equally upon "any ratepayer in the metropolis." Quite apart from the hardship I have already pointed out as likely to result from such a proceeding, it would be startling to find that when a valuation list had been completed and revised in the elaborate manner provided by the Legislature, and when the valuation of particular hereditaments might have been settled after objection, by the assessment committee, or on appeal by the special sessions or even by the assessment sessions, any individual ratepayer could compel a reconsideration of such of the valuations as he pleased, and that behind the back of the parties to such appeals, who might nevertheless be gravely affected by the result.

Of course, if the language used by the Legislature were such as to confer unequivocally this right, no sense of the inconvenience or even of the possible injustice of the legislation would justify any other construction. But, in my opinion, the terms of the enactment point in the contrary direction. The ground of appeal is that "the total of the gross value" or "the total of the rateable value" is too high or too low. The expression is somewhat peculiar, but its use is intelligible when other parts of the Act are examined. I have already pointed out that by sect. 14, when the assessment committee have finally approved the valuation list, they are to "cause the totals of the gross and rateable value in such lists to be ascertained and inserted in the list." The clerk to the managers of the metropolitan asylums district is (sect. 17) to "cause the totals of the gross and rateable values of all the valuation lists to be printed," and sent to the public bodies there specified. By sect. 20 the justices in special sessions are not to hear any appeal touching any part, or alter any part, of the valuation list except the part relating to the value of an hereditament, and an alteration by them of the value of an hereditament in the valuation list is only to affect the rights of the ratepayers amongst themselves, and is not of itself in any way "to alter the totals of the gross or rateable value of such list as settled by the assessment committee, but may form a reason for an appeal against such totals to the assessment sessions as hereinafter mentioned."

Now, I find in these provisions the totals and the ascertainment of the totals dealt with apart from the valuations of individual hereditaments comprised in the list, and an alteration of the value of an hereditament is not treated as involving, as a mere clerical correction, an alteration of the total of the gross and rateable values. Provision is indeed made for such a correction if individual valuations be altered, but it is by way of appeal under sect. 32.

It is not necessary to determine in what other cases an appeal might be preferred against the total. Possibly, if some wrong principle had been adopted throughout the parish for arriving either at the gross or rateable value which would affect the valuation generally, the case might be within the section; but I entirely agree with the Court of Appeal that it was not intended to allow any ratepayer, or even the appellants, to maintain such an appeal as that under discussion.

For these reasons, I think the judgment appealed from should be affirmed, and the appeal dismissed with costs, and I move your Lordships accordingly.

My noble and learned friend, Lord Morris, who is unable to be present to-day, has asked me to state that he has read this judgment and entirely concurs with it.

H. L. (E.)
1894
London County Council
v.
Assessment Committee of St. George's Union.

Lord Watson:—

My Lords, I concur in the judgment which has been moved, and also in the reasons which have been assigned for it by the Lord Chancellor.

Lord Ashbourne:—

My Lords, I also concur.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 2nd August 1894.

Solicitor for appellants: *W. A. Blaxland.*

Solicitors for respondents: *Caprons, Dalton, Kitchens, & Brabant.*

Explained. *Re* A Debtor (No. 564 of 1949) [1950] 1 Ch. 282

[HOUSE OF LORDS.]

H. L (E.)
1894
Aug. 14.

LOVELL & CHRISTMAS . . . . . . Appellants;

AND

GILBERT WALTER BEAUCHAMP . . Respondent.

Bankruptcy—Act of Bankruptcy—Receiving Order—Partnership Firm—Infant Partner—Judgment against Firm—Amendment of Proceeding—Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52) *ss.* 4, 5, 6, 105—*Bankruptcy Rules* 1886 *rr.* 260, 262, 264—*Rules of the Supreme Court, Order* XLVIII. A *rr.* 5, 8.

In an action against a firm of which it appears that one partner is an infant, for goods supplied to the firm, judgment cannot be recovered against the firm simply, but may be recovered against "the defendants other than" the infant partner. So if an act of bankruptcy is committed, a receiving order cannot be made against the firm simply, but may be made against the firm "other than" the infant partner; and if a receiving order has been made against the firm simply the proceedings may be amended under the Bankruptcy Act 1883 s. 105.

The decision of the Court of Appeal ([1894] 1 Q. B. 1) varied accordingly.

Appeal from an order of the Court of Appeal (1).

The following statement of the facts is taken from the judgment of Lord Herschell, L.C.:—

The respondent, Gilbert Walter Beauchamp, was a partner in

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(1) [1894] 1 Q. B. 1.

H. L. (E.)
1894
Lovell & Christmas v. Beauchamp.

the firm of Beauchamp Brothers. He was and is an infant. Goods which had been supplied upon the order of the firm by the appellants not having been paid for, an action was brought in the Queen's Bench Division against the firm in the firm's name. An appearance was entered for Ralph Beauchamp, and for Gilbert Walter Beauchamp, the infant, by his guardian ad litem. The plaintiffs having applied to sign judgment under Order XIV., it was objected that Gilbert Walter Beauchamp, being an infant, was not liable. An order was, however, made on the 2nd of August, 1893, adjudging that the plaintiffs do recover against the defendants £358 8*s.* 10*d.*, and costs to be taxed.

A judgment having been obtained in the same terms by Harris, another person who had supplied goods to the firm and issued a writ against them, it was on an appeal to the Divisional Court to set aside that order ordered that the defendants' application be dismissed with costs. But it was also ordered that execution was not to issue against the separate property of Gilbert Walter Beauchamp, infant, or against his share, if any, in the partnership profits. The Court of Appeal refused to disturb the order thus made by the Divisional Court (1).

On the 2nd of August, 1893, Lovell & Christmas served a bankruptcy notice on Beauchamp Brothers founded on their judgment, intimating that if the requisitions of the notice were not complied with an act of bankruptcy would be committed. The money not having been paid, Lovell & Christmas presented a petition for a receiving order in respect of the estate of Beauchamp Brothers. Upon this petition a receiving order was made against Beauchamp Brothers. This order was rescinded by the Court of Appeal (Lord Esher M.R., Lopes and Kay L.JJ.) upon the ground that one of the partners of Beauchamp Brothers being an infant the receiving order could not properly be made against the firm (2). The Court of Appeal granted leave to appeal to this House, but on the terms that the judgment in the Queen's Bench Division of the 2nd of August 1893 should be treated as affirmed in the Court of Appeal, with leave to the respondent G. W. Beauchamp to lodge a cross appeal. This the respondent did.

(1) [1893] 2 Q. B. 534.

(2) [1894] 1 Q. B. 1.

H. L. (E.)
1894

LOVELL & CHRISTMAS *v.* BEAUCHAMP.

July 30, 31; Aug. 2. *Finlay* Q.C. and *Cooper Willis* Q.C. (*Wedderburn* with them) for the appellants:—

An infant cannot withdraw his capital from a firm until all the creditors have been satisfied. The judgment against the firm is good and the bankruptcy notice must follow the judgment; and the whole proceedings ought not to be invalidated because there is difficulty in enforcing execution against one member of the firm. The only appeal against the receiving order is by the infant. It would be unreasonable that the presence of an infant in what might be a large firm should paralyse the creditors in taking bankruptcy proceedings. The whole assets of the firm and the separate property of all the members who can be adjudicated bankrupt can be reached: Bankruptcy Rules 1886 rr. 259–264; and by sect. 111 of the Bankruptcy Act 1883 where there are more respondents than one to a petition, the petition against one may be dismissed without prejudice to the petition against the others. The Act and Rules must be considered together with the Judicature Rules: see Order XLVIII. A rr. 1, 2, 5, 8; Bankruptcy Act 1883 s. 4 sub-s. *g*; Bankruptcy Forms No. 6. The strictness with which the rules must be followed is shewn in *In re Howes* (1).

The extent of an infant's liability is shewn in many cases. In *Ex parte Taylor* (2) it was held that an infant who paid a premium to join a partnership could not, on attaining twenty-one, disaffirm the contract or prove in the bankruptcy of his partner: see also *Ex parte Liddel*, cited by Lord Eldon in *Ex parte Adam* (3). The case of a foreign partner is dealt with in *Ex parte Blain* (4). An infant's contract of partnership is not void, but at most only voidable. There is no magic in the word "infant," and under the old law when a partner pleaded infancy the contract was held to be with the other members of the firm.

Sir *Henry James* Q.C. and *Arthur Powell* for the respondent:—

An infant's trading contracts are void. So far back as 16 James 1 it was held in *Whittingham* v. *Hill* (5) that an infant trader was not liable for goods supplied to carry on a trade with. He could not be made a bankrupt: *Ex parte Henderson* (1). In *Ex parte Layton* (2) Lord Eldon observed that where one partner is an infant or a lunatic there cannot be a joint commission of bankruptcy against the others, but separate commissions must be taken.

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(1) [1892] 2 Q. B. 628.

(2) 8 D. M. & G. 254.

(3) 1 V. & B. 494.

(4) 12 Ch. D. 522.

(5) Cro. Jac. i. 494.

By sect. 115 of the Act of 1883 for the first time it was made possible to take proceedings against a firm as such. But that does not affect the long-established principle that no man can be made a bankrupt unless he is individually liable to the law of bankruptcy. Joint commissions might be issued against some only of the members of a firm: Cooke on Bankruptcy; 3 Geo. 4 c. 81 s. 8. It is not the firm which contracts.

[*Finlay* Q.C.:—The judgment had to follow the suit: *Jackson* v. *Litchfield* (3).]

For the effect of the receiving order see Act of 1883 s. 4 sub-s. *g*. The receiving order must be against all the members of the firm; and the respondent is protected by infancy. No doubt an infant may be a partner in a firm: Lindley on Partnership, 6th ed. p. 82; *Goode* v. *Harrison* (4). But the law affecting him is the same as that which was applied in *Whittingham* v. *Hill* (5), and which governs this case. The whole foundation of the receiving order is an act of bankruptcy, which is a personal act of which an infant is incapable. The judgment ought never to have been entered, and the judgment being the foundation of the bankruptcy proceedings and being bad, the whole proceedings must fall to the ground.

[They cited *Western National Bank of New York* v. *Perez, Triana & Co.* (6); *Worcester City and County Banking Company* v. *Firbank, Pauling & Co.* (7); *Ex parte Kibble* (8).]

Cooper Willis Q.C. in reply cited *Burgess* v. *Merrill* (9); *Gibbs* v. *Merrill* (10).

(1) 4 Ves. 163.
(2) 6 Ves. 434, 439.
(3) 8 Q. B. D. 474.
(4) 5 B. & Ald. 147, 157.
(5) Cro. Jac. i. 494.
(6) [1891] 1 Q. B. 304.
(7) [1894] 1 Q. B. 784.
(8) Law Rep. 10 Ch. 373.
(9) 4 Taunt. 468.
(10) 3 Taunt. 307.

The House took time for consideration.

Aug. 14. LORD HERSCHELL, L.C. :—

My Lords, I do not think there can be any doubt as to the substantial rights of the parties in this case. The form which the proceedings have taken gives rise to greater difficulty. [His Lordship stated the facts given above.]

My Lords, I proceed now to state what I conceive to be the true position of the parties. I think it clear that there is nothing to prevent an infant trading, or becoming partner with a trader, and that until his contract of partnership be disaffirmed he is a member of the trading firm. But it is equally clear that he cannot contract debts by such trading; although goods may be ordered for the firm he does not become a debtor in respect of them. The adult partner is, however, entitled to insist that the partnership assets shall be applied in payment of the liabilities of the partnership, and that until these are provided for no part of them shall be received by the infant partner, and if the proper steps are taken this right of the adult partner can be made available for the benefit of the creditors.

It is also clear that even if there are circumstances under which an infant may be adjudicated bankrupt, or a receiving order may lawfully be obtained as a step towards such adjudication, he cannot be made subject to the bankrupt laws in respect of any debt contracted by the firm of which he is a partner.

The plaintiffs were, no doubt, entitled to issue a writ against the firm in the firm's name. But it is to be observed that the order (XLVIII. A) which sanctions such a proceeding provides (rule 5) "that persons sued as partners in the name of their firm shall appear individually in their own names." As soon as it appeared that a member of the firm was an infant, I do not think that it was proper to sign judgment against the firm.

The Divisional Court appear to have taken the view that, inasmuch as one of the partners was an infant, the firm might be treated for the purposes of the action as consisting only of the other partner, but I do not think this is so. Although an infant he was a partner, and the firm name, Beauchamp Brothers, applied as much to him as to an adult partner. The Court of

Appeal took the view that the judgment against the firm was good and might be made available against the partnership property, though it would be ineffectual as against the infant partner. I have a difficulty in seeing how it can be supported. Although the judgment may be pronounced against the firm in the firm's name, it is in reality a judgment against all the persons who are in fact members of the firm; and it is because such a judgment exists that the right of execution follows. It cannot be regarded as a judgment merely against the assets of the firm. The right of execution, whatever it may be, arises from the fact that certain persons have been adjudged debtors. I have already said that in my opinion the infant could not be so adjudged.

It is true that rule 8 of Order XLVIII. A which sanctions, in the case of a judgment against a firm, execution against the property of the partnership, restricts any further execution except in specified cases without leave of the Court or a judge. But I do not think this affords warrant for a judgment against a firm including a person who, though a member of the firm, was not a debtor. It appears to me, therefore, that the judgment should either have been against Ralph Beauchamp alone or against the firm, excepting Gilbert Walter Beauchamp. I shall have to say something further on this point presently.

If the judgment had been in either one or the other of these forms a receiving order might no doubt have been obtained upon the petition of Lovell & Christmas against Ralph Beauchamp, and in the proceedings in bankruptcy the partnership assets might have been made available for those who had given credit to the firm. The respondent insists that the bankruptcy proceedings were properly set aside, inasmuch as the receiving order against the firm would operate under rule 262 as if it were a receiving order made against each of the persons who, at the date of the order, was a partner in the firm, and therefore as a receiving order against him.

I agree with the Courts below in thinking that the receiving order in the form in which it was made by the registrar cannot stand. The question is, under those circumstances, what ought to be done? I am most unwilling, if it can be avoided, to deal with the receiving order in a manner which would liberate Ralph Beauchamp from its operation and render fresh bankruptcy proceedings necessary. If the judgment and receiving order stand as against him, he will certainly suffer no injustice; whilst if the receiving order be set aside absolutely, and a fresh petition is thus rendered necessary, transactions which might be avoided under the present receiving order in the interests of creditors, might become incapable of avoidance under a receiving order of a later date.

I see no difficulty in amending the judgment by adding after the word "defendants" the words "other than Gilbert Walter Beauchamp." There is, I think, nothing irregular in a judgment against a firm in the firm's name excluding one of the partners. It may be, in many cases, of advantage to the plaintiff to obtain such a judgment where he fails to establish the liability of a member of the firm, inasmuch as the judgment would bind not only the partners who have appeared, but also any dormant partners who have not appeared. This might be a reason for taking the judgment in that form rather than as a judgment against the known members of the firm who were liable for the debt.

Supposing the judgment thus amended, I think the bankruptcy proceedings may be amended in conformity therewith by adding throughout after the words "Beauchamp Brothers" the words "other than Gilbert Walter Beauchamp."

The Bankruptcy Act gives ample powers of amendment. By sect. 105 the Court may at any time "amend any written process or proceeding under this Act on such terms, if any, as it may think fit to impose." Instead, therefore, of setting aside the receiving order, I think the proper course will be to amend it in the manner which I have suggested. It will thus constitute as from its date a valid receiving order against Ralph Beauchamp, and I think the receiver appointed under that order should also be appointed receiver of the partnership assets for the purpose of protecting them for the benefit of the creditors.

I think there should be no costs on either side of these proceedings. If any have been paid they should be repaid or allowed in account as against costs due from the other party.

H. L. (E.)
1894
LOVELL & CHRISTMAS v. BEAUCHAMP.

LORD ASHBOURNE :—

My Lords, I concur.

It would be most unfortunate if the adult members of a partnership could evade liability because one of the partners was a minor. If this was laid down minors would be found in many partnerships.

The powers of amendment referred to by my noble and learned Friend on the Woolsack enable a Court to recognise adequately the position of the minor, without freeing any adult member of the partnership from any legal liability he may be under.

THE LORD CHANCELLOR :—

My Lords, my noble and learned Friends Lord Watson and Lord Macnaghten, who are unable to be present to-day, desire me to say that they have read the judgment which I have pronounced, and entirely concur in what I have said.

Order appealed from discharged, the judgment in the Queen's Bench Division of the 2nd of August, 1893, *varied by adding after the word "defendants" the words "other than Gilbert Walter Beauchamp"; the proceedings in bankruptcy and the receiving order to be amended by adding throughout after the words "Beauchamp Brothers" the words "other than Gilbert Walter Beauchamp"; each party to pay their costs of the proceedings here and in the Courts below, but with liberty to the appellants Lovell & Christmas to apply in the bankruptcy for the costs incurred by them in the Courts below and here; if any costs have been paid by either party to the other, such costs to be either repaid or allowed in account against any costs which may have been paid to that party by that other; cause and receiving order remitted to the Queen's Bench Division and the Court of Bankruptcy respectively.*

Lords' Journals 14th August 1894.

Solicitors for appellants: *Godfrey & Webb.*
Solicitors for respondents: *Harper & Battcock.*

[PRIVY COUNCIL.]

J. C.*
1894
March 14, 15
June 30.

WINNIPEG STREET RAILWAY COMPANY . . . . PLAINTIFFS;

AND

WINNIPEG ELECTRIC STREET RAILWAY COMPANY AND THE CITY OF WINNIPEG . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, MANITOBA.

Construction—Deed of Grant—Exclusive Right of Railway to Portions of Streets in actual Occupation—Right to Refuse other Streets for Railway Purposes.

Where a municipal council granted to a railway company authority to construct, maintain, and operate railways in its streets, with the exclusive right to such portion of any street as shall be occupied by the railway, but with the plain intent that the company should have no concern whatever with any portions of any street not in actual occupation by their rails:—

Held, that a subsequent clause in the deed of grant giving to the company the refusal on terms of other streets in the city for railway purposes was insufficient to constitute, contrary to the plain meaning of the previous stipulations, a right of monopoly in any of the streets of the city.

Quære, whether if a monopoly had been conceded it was ultrà vires of the municipal council.

APPEAL from a decree of the Court of Queen's Bench, Manitoba (May 13, 1893), affirming a decree of Bain, J. (Dec. 12, 1892), which dismissed the appellants' suit with costs.

The appellant company was incorporated by 45 Vict. c. 37 (Manitoba); the City of Winnipeg by 45 Vict. c. 36; and the respondent company by 55 Vict. c. 56.

The object of the suit was to obtain a declaration that the appellants were entitled to the exclusive right to use for tramway purposes the whole of Main Street and Portage Avenue, in the City of Winnipeg, upon which the appellants were running their street cars, and an injunction against the respondent company from operating tramways on those streets. The bill of complaint also asked that the respondent company might be restrained from operating tramways upon certain other streets in Winnipeg therein named, on which the appellants then had no lines in operation, the appellants claiming that, under the bye-law and agreement and their Act of incorporation below referred to, they had the first right to build and construct street railways upon any street in the City of Winnipeg, and that the respondent company had no right to occupy the same for street railway purposes, or the city to grant that privilege, until the appellants had been offered the privilege of constructing the same, and had not accepted such offer within two months.

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* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD MACNAGHTEN, and SIR RICHARD COUCH.

Accordingly, the questions in the suit were—(1.) whether the city had power to grant to the appellants a monopoly or exclusive right as claimed; (2.) whether it actually granted or purported to grant such exclusive rights by the bye-law and agreement; and (3.) whether there was power in the city to agree with the appellants that no right to build or operate tramways should be given to other parties proposing to build on streets not built upon by the appellants until two months after such right had been offered to the appellants.

The facts are stated in the judgment of their Lordships.

Bain, J., decided the third question in the negative, and, therefore, that it was unnecessary to consider whether bye-law 178, or the agreement with the appellants founded thereon, amounted to such agreement as stated in the question. He held that sect. 154, sub-sect. 7, of 45 Vict. c. 36, on its true construction did not authorize such agreement unless it could be shewn that a grant of a monopoly to the appellants was necessary to induce them to enter into the agreement, or that the existence of a second railway system in the same street was necessarily attended with danger to the public.

The Court of Queen's Bench, on appeal, affirmed the above ruling. Taylor, C.J., further held that neither the bye-law 178, passed on the 12th of June, 1882, nor the deed of grant founded thereon, purported to convey to the appellants the exclusive right claimed. He held that clause 1 of the bye-law merely conferred a right to lay down tracks, and to use the tracks when laid down, subject to the right of public user conferred by

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1894

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clause 16; and, further, that the city had no power under the bye-law to compel the appellants to continue the running of cars upon the tracks during the term granted, if the appellants chose to desist from doing so.

The Solicitor-General (Sir *John Rigby*), *Blake*, Q.C., of the Canadian Bar, and *Gore*, for the appellants, contended that those judgments were erroneous. They referred to clause 25 of the bye-law as embodied in the deed of grant to the appellants. Its terms were: "In the event of any other parties proposing to construct street railways on any of the streets not occupied by the parties to whom the privilege is now to be granted the nature of the proposal thus made shall be communicated to them, and the option of constructing such proposed railway on similar conditions as are herein stipulated shall be offered, but if such preference is not accepted within two months, then the corporation may grant the privilege to other parties." Under the plain terms of this clause, which was an essential part of the contract, it was contended that the appellants had, in respect of streets in which they had not laid down railways, a right to prevent the city from granting to other companies or persons leave to do so, provided the appellants on receiving notice to that effect agreed to lay them down themselves. The clauses of the deed of grant were referred to in support of the contention that there had been, independently of clause 25, or at least when read in conjunction therewith, conferred on the appellants an exclusive right to perform all such acts as the bye-law and deed legalized, namely, to lay down rails and run cars for hire subject to the rights of way reserved to the public by clause 16. Such exclusive right could only be infringed in pursuance of such power as is reserved by clause 25, the express reservation of which negatives the existence of a like power in cases not coming within the clause. In any case, the city is precluded by clause 25 from granting to the respondent company the right claimed by it, unless the appellants had previously refused on notice to construct railways in the streets to which the respondents' claim relates. Reference was made to sect. 154, sub-sect. 7, of 45 Vict. c. 36 (Manitoba), and it was contended that the city council could only authorize

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the laying down of one system of railway or tramway in any one street within the municipality; and otherwise clause 25 of the deed of grant, being made for valuable consideration and bonâ fide, was intrà vires of the city. Reference was also made to 55 Vict. c. 56, s. 33, and to *Ayr Harbour Trustees* v. *Oswald* (1) and to *Small* v. *Smith* (2).

Finlay, Q.C., *Munson*, and *Hollams*, for the Winnipeg Electric Street Railway Company; and

Ewart, Q.C., of the Canadian Bar, and *Bray*, for the City of Winnipeg, were not heard.

1894
June 30.

The judgment of their Lordships was delivered by

LORD WATSON:—

The first question raised in this appeal depends upon the construction of a deed of indenture, which was made on the 7th of July, 1882, between the mayor and council of the City of Winnipeg of the first part, and the appellants who will hereafter be referred to as "the company" of the second part. If the judgment of the Court below upon that point be affirmed, the appeal must necessarily fail.

The company were incorporated by an Act of the Legislature of Manitoba (45 Vict. c. 37), which received the royal assent upon the 27th of May, 1882, the object of their undertaking being generally described as the construction, maintenance, and operation of street railways within the City of Winnipeg. In furtherance of that object, they were empowered to use and occupy such parts of the streets of the city as might be required for the purpose of constructing and using their railways, subject always to the condition, that they should obtain the consent of the city to the construction of their works, and should only use and occupy such portions of the streets as were required for that purpose, for such period and upon such conditions as might be agreed on between them and the city.

At the time when the company obtained their Act, the City of Winnipeg had statutory authority to pass bye-laws "for regulating and governing street railway companies and fixing the rates to be charged thereon." Three days afterwards a consolidating statute (45 Vict. c. 36) was passed in favour of the city, which, inter alia, conferred the power to make bye-laws "for authorizing the construction of any street railway or tramway upon any of the streets or highways within the city, and for regulating and governing the same, and for fixing the rates to be charged thereon."

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(1) 8 App. Cas. 623.

(2) 10 App. Cas. 119.

The city authorities gave their consent to the company's undertaking being carried out, upon terms which were first specified in a bye-law passed by the mayer and council, upon the 12th of June, 1882. It was thereby provided that the bye-law should not come into operation until an agreement had been made with the company, as contemplated in their Act of incorporation. The indenture already mentioned was then executed; and, in so far as its bears upon the present case, it simply repeats the substance of the bye-law. According to its terms, the privileges conceded to the company were to endure for the period of twenty-five years from its date, it being in the option of the city to acquire the company's undertaking, at the expiry of that period, upon their giving five years' previous notice to that effect.

The company at once proceeded with their enterprise, and before the year 1892 they had completed and were in course of working upwards of nine miles of street railways; and they also contemplated and had made arrangements for the extension of their system to other streets within the city. On the 1st of February, 1892, the mayor and council passed a bye-law authorizing James Ross and William McKenzie to construct railways upon the streets of the city. The respondent company (hereinafter referred to as "the new company") then obtained an Act of the Provincial Legislature (55 Vict. c. 56), which received the royal assent on the 26th of April, 1892, incorporating them for the purpose of their taking over the rights conceded to Ross and McKenzie, and carrying out the scheme sanctioned by the bye-law of the 1st of February, which was scheduled to the Act.

The new company's bill was opposed by the company, who alleged that under their own Act, and their subsequent agreement with the mayor and council, they were entitled to a monopoly, for the period of five and twenty years from and after the date of the agreement, of all those streets in which their railways had already been opened for traffic, and also of certain other streets in which they had intimated that they were willing and ready to construct and operate railways. For the purpose of safeguarding any exclusive privilege to which the company might be able to establish their legal right, the following clause was inserted in the new company's Act: "Nothing contained in this Act or in the schedule thereto shall in any way affect or take away any right held by, vested in, or belonging to the Winnipeg Street Railway Company, if any such there be, but any such right may be held and exercised by the Winnipeg Street Railway Company as fully and effectually as if this Act had not been passed, but nevertheless the Winnipeg Street Electric Railway Company shall have power to cross, build and operate its line of railway across the lines of the Winnipeg Street Railway Company subject to the provisions of the Manitoba Railway Act." It is unnecessary to criticise the enactments of the clause, because it was not disputed, in the argument addressed to their Lordships, that these would be sufficient to protect any such privilege as that which is claimed by the company in this appeal.

The company commenced the present suit by presenting to the Court of Queen's Bench (in Equity) a bill of complaint against the new company and against the City of Winnepeg. The relief sought by the company need not be recited at length. They craved, inter alia, a declaration of the exclusive rights which they claim against both respondents, and an injunction restraining the new company from constructing or operating railways in any street occupied by them, or in any street not then occupied by them, until an offer had been made to them of the privilege of constructing a railway upon it, and had not been accepted by them within two months. In defence to the suit, the respondents maintained, in the first place, that the company were not possessed of any exclusive privilege, and that the city had therefore power to sanction the construction of

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railways by the new company in any street of the city, whether it was already occupied by the company or not; and, in the second place, that, if the city had in fact agreed to give the company a monopoly of the railway traffic in certain streets, the agreement was ultrà vires and void. These appear to have been the only points discussed in the Courts below; and the argument addressed to their Lordships, by counsel for the company, was strictly confined to them.

The cause was tried before Bain, J., who dismissed the bill of complaint with costs; and his decision was affirmed, on a rehearing by way of appeal, by a Full Court, consisting of Taylor, C.J., with Dubuc and Killam, JJ. In the Court of First Instance, the learned judge did not deal with the first point; but, assuming the alleged privilege of the company to have been conceded by the city, held that it was void in law. In the Full Court, both points were decided against the appellants.

The Company's Act (sect. 9) gives them power and authority (subject always to the consent of the city) to "use and occupy any and such parts of any of the streets and highways aforesaid, as may be required for the purposes of their railway track, the laying of the rails and the running of their cars and carriages." The same clause authorizes the city to grant permission to the company to construct their railway, as aforesaid, "across and along, and to use and occupy the said streets or highways, or any part of them, for that purpose, upon such condition, and for such period or periods as may be respectively agreed upon between the company and the said city." It appears to their Lordships that the language of the statute confers upon the company no right to use and occupy any part of the streets and highways within the city beyond what is strictly necessary for the temporary purpose of constructing their railways, and for the permanent purpose of maintaining them in repair, and conducting traffic upon them. Their Lordships do not find a single expression tending to shew that the Legislature either intended that no tramways, other than those of the company, were to occupy the streets of Winnipeg, or had it in contemplation that the company were to obtain a monopoly from the council of the city. There is no indication of any such monopoly to be found among the matters specially enumerated in sect. 17 of the Act as the subjects of the agreement which the city council have statutory authority to make with the company. It necessarily follows, that the exclusive privilege claimed by the company, if it has any existence, must be derived from the indenture of the 7th of July, 1882.

By the terms of the indenture, the mayor and council of the city grant to the company, their successors or assigns, the right to construct, maintain, and operate, and from time to time to remove and change, "a double or single track railway with the necessary side tracks, switches and turn-outs for the passage of cars, carriages and other vehicles adapted to the same, upon and along any of the streets or highways of the City of Winnipeg, and to run their cars, take transport and carry passengers upon the same by the force and power of animals, or such other motive power as may be authorized by the said council of the said city." The only authority given is expressly limited to the construction, maintenance, and operation, in each street which the company may select for that purpose, of a railway, consisting of a single or double line of rails, with needful appurtenances; and the words which confer that authority are immediately followed by the declaration "and such railway shall have the exclusive right of such portion of any street or streets as shall be occupied by the said railway, and shall be worked under such regulations as may be necessary for the protection of the citizens of the said city."

That declaration appears to their Lordships to have been inserted in the agreement with the object of defining the extent of the uses which the company were to have of the streets of the city for the purposes of their undertaking. The company argued that the words last quoted ought to be construed as a declaration that the company's railway was to be the only railway permitted to occupy any part of those streets into which it might be introduced by them. In their Lordships' opinion, any such construction would be contrary to the plain meaning of the words of the agreement, which, in substance, import that the company are to have no use or occupation of, and no concern

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with, those portions of any street which are not actually occupied by their double or single line of rails.

The main and the only plausible argument addressed to this Board for the company, in support of their claim to a monopoly, was founded on the terms of a clause which occurs towards the end of the indenture. It runs thus: "In the event of any other parties proposing to construct street railways on any of the streets not occupied by the parties to whom the privilege is now granted, the nature of the proposal thus made shall be communicated to them, and the option of constructing such proposed railway on similar conditions as are herein stipulated shall be offered, but if such preference is not accepted within two months, then the parties of the first part may grant the privilege to any other parties."

Their Lordships do not think that it is going too far to say that, laying aside the terms of that stipulation, there is not a single expression in the deed of agreement which gives the least countenance to the suggestion that the municipal council intended to grant to the company an exclusive right to use and occupy any street for railway purposes. Those clauses of the deed, which deal directly with the use and occupation of the streets which are to be enjoyed by the company, are not only silent upon the question of exclusive right, but are conceived in terms which it is exceedingly difficult to reconcile with the theory of an intention to create such a right. Had there been any such intention, nothing would have been easier than to indicate its existence, in the proper place, either expressly or by implication. In such circumstances, their Lordships are of opinion that the leading clauses of the agreement, which define the company's rights of user and occupation, cannot be qualified by a subsidiary clause, such as that upon which the company relies, unless its terms are clear and coercive. They are unable to hold that the terms of the clause in question are in themselves sufficient to control the plain meaning of the previous stipulations, and to constitute the right of monopoly which the appellant company claims.

The clause in question assumes that other parties than the company may propose, and obtain powers, to construct, maintain, and work street railways within the limits of the City of Winnipeg; and, in that event, all that it really provides is that the company are to have a preference over these rivals, to the extent of having the first opportunity of making a railway in streets to which their undertaking has not yet been extended. Its terms are certainly calculated to suggest that neither the council nor the company did, at the time, anticipate that the rival schemes of those other parties would be carried to the length of competing with the company in streets where they had already constructed, or in streets where they would be the first to construct, their railway lines. But a mere expectation of that kind falls far short of a legal obligation. It cannot imply an undertaking, on the part of the council, that in the event of a rival company obtaining statutory powers, and desiring to compete with the appellant company in those streets in which their system has already been established, the council shall be bound, although against the interest of the community which it represents, to refuse its assent to the new scheme, and to allow the company to remain in the enjoyment of a monopoly.

Such being the opinion of their Lordships, it becomes unnecessary to consider whether, if a monopoly had been conceded, the concession would have been ultrà vires of the council.

Their Lordships will therefore humbly advise Her Majesty that the judgments appealed from ought to be affirmed. The appellant company must pay one set of costs to the respondents.

Solicitors for appellants: *Bompas, Bischoff, Dodgson, Coxe, & Bompas.*

Solicitors for respondent company: *Wilson, Bristows, & Carpmael.*

Solicitors for City of Winnipeg: *Freshfields & Williams.*

[PRIVY COUNCIL.]

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June 26, 27; July 14.

S.S. "DIANA" (Austrian) . . . . . Appellant;

AND

S.S. "CLIEVEDEN" (British) . . . . Respondent.

THE "CLIEVEDEN."

ON APPEAL FROM HER BRITANNIC MAJESTY'S SUPREME CONSULAR COURT AT CONSTANTINOPLE.

Regulations as to Navigation of Lower Danube, Art. 32—Collision—Duties of Ascending and Descending Ships.

Where a ship ascending the Danube finds itself exposed to the risk of meeting a descending ship at or near a point which does not afford sufficient breadth for passing:—

Held, that art. 32 of the regulations applicable to the Lower Danube is imperative, and that the ascending ship is bound to stop and wait.

Although an ascending ship is clearly wrong in forcing her way contrary to art. 32, yet when her intention so to do is reasonably apparent, a descending ship commits contributory fault by insisting on her right of precedence.

APPEAL from two decrees (Sept. 6, 1893) made in an action by the appellant and cross-action by the respondent.

Both actions claimed damages resulting from a collision.

The facts are stated in the judgment of their Lordships.

Sir *Walter Phillimore*, Q.C., and Dr. *Stubbs*, for the appellant.

Bucknill, Q.C., *Safford*, and *Holman*, for the respondent.

[Reference was made to the *Talabot* (1); *Russian S.S.* "*Yourri*" v. *British S.S.* "*Shearman*" (2); and to art. 32 of chap. 2 of the Danube Regulations, which chap. 2 comprises regulations for vessels crossing or passing one another.]

* *Present*:—Lord Watson, Lord Morris, and Sir Richard Couch.

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(1) 15 P. D. 194.

(2) 10 App. Cas. 276.

1894. July 14. The judgment of their Lordships was delivered by

LORD WATSON:—

Shortly after mid-day of the 19th of October, 1892, and in clear weather, the Austrian steamship *Diana* and the British steamship *Clieveden* met and collided in the River Danube, at or near the point where the Sulina arm diverges from the St. George's arm of the river. The Sulina arm, which runs a separate course eastwards from that point until it reaches the Black Sea, branches off from the north side of the St. George's arm, and commences with an artificial cut, more than three quarters of a mile in length and about 400 feet in width, measuring from bank to bank.

Throughout the upper half of its length the water of the cut in question is much deeper to the south of mid-channel than to the north of that line, where it gradually shoals out until it reaches a mud-bank; and the breadth of available waterway depends upon the draught of the vessels navigating it. The length of the *Diana* was 270, and her breadth of beam 35 feet; whilst the *Clieveden* was 250 feet long, and 37 feet across her beam. Each vessel was a little over 1000 tons burthen, and was drawing 16½ feet of water. For ships of that draught, the waterway of the upper half of the cut, during average low water, did not exceed from 180 to 200 feet in width, and was confined to the south of the mid-channel line.

At one point, about 250 feet below its divergence from the St. George's arm, the available waterway of the cut is, for a very short distance, greatly reduced in width by shoal water on the north. For vessels with a draught of 16½ feet, it is not wider, during average low water, than 120 feet at that point. The evidence shews that, on the day of the collision, the water of the Danube was exceptionally low; and, although there are not sufficient data for a precise calculation, it must, in the opinion of their Lordships, be assumed that the width of the navigable channel, at the point in question, was at that time appreciably less than 120 feet. It is also established by the evidence that, at the upper end of the cut and for some distance above it, there is a cross current from north to south, which makes it impossible to keep the head of an ascending steamship steady without the aid of a port helm.

The *Diana* was on her way down the river, with a two-knot per hour current in her favour, and with the intention of descending the Sulina arm. The *Clieveden* was ascending that arm against the same current, on her way to a port above. The two ships appear to have first sighted each other across the land, when they were about three miles apart; and, from that time until the collision occurred, they continued in sight, although, owing to a curve in the river, their hulls did not become mutually visible until the distance between them was considerably less than a mile. The proper course for two steamships approaching each other under such circumstances, in any part of the channel where there is room for them to pass, is to meet port to port, the descending vessel keeping on the south, and the ascending vessel on the north of the channel. The evidence from both ships makes it apparent that, from the time when they first came in sight, it was the deliberate purpose of each to pursue her course without stopping until she met and passed the other.

At the time when the *Diana* and the *Clieveden* first came in sight of each other, a tug, with four craft in tow, was slowly ascending the Sulina arm, about a mile ahead of the *Clieveden*. She moderated her speed, in order to allow the tug and her tows to get clear of the cut before she overtook them. The *Diana* also saw the position of the tug, and slowed, so as to permit the tug to pass her before she entered the cut. The tug accordingly met and passed the *Diana* in the St. George's arm, at a point somewhat less than half a mile above the entrance to the cut; and, at that moment, the evidence appears to their Lordships to shew that the *Clieveden* must have reached a point somewhat more than one-third of a mile below the entrance to the cut. From these points the two vessels went on their way, with the result that they came into collision at the entrance to the cut, immediately after the stern of the *Clieveden* had cleared the narrow passage already described, her stem striking the port side of the *Diana* nearly at right angles. At the instant of collision the *Diana* was heading to the south-east, and somewhat across the stream, that position being apparently due to her having turned her engines astern. Amid much uncertainty two things appear to their Lordships to be tolerably certain. The first of these is, that at the time when the tug passed the *Diana* it must have been clear to both vessels that, if they both continued to advance, they would meet near or in the narrow passage; and the second that, at the time when the *Clieveden* struck her, the *Diana* was on the south side of the channel, and in the water which she was entitled to occupy, if she was justified in pursuing her course.

The *Clieveden* maintains that the collision was wholly attributable to the fault of the *Diana* upon these two grounds. In the first place, she contends that it was the duty of the *Diana* to stop and wait above the entrance to the Sulina cut until the *Clieveden* had passed through it. In the second place, she alleges that the *Diana*, when two or three ship lengths above the entrance to the cut, executed a wrong manœuvre, by first starboarding her helm, and thereby opening her starboard bow to the *Clieveden*, so as to indicate that she meant to cross the bows of the *Clieveden*, and to pass down between that vessel and the north bank, and then suddenly changing her course and sheering back to the south.

The *Diana*, on the other hand, maintains that the *Clieveden* was solely to blame for the disaster. She attributes the collision (1.) to the failure of the *Clieveden* to stop and wait below the neck of navigable water near to the top of the cut until the *Diana* had cleared it; and (2.) to the *Clieveden* having, just before the collision, rendered it inevitable by changing her course from the north to the south side of the channel.

The case thus presented in argument involves two separate questions. The first of these is, whether it was the duty of one of these ships to stop and wait until the other passed; and, if so, upon which of them that duty was incumbent? The second relates to their mutual charges of faulty manœuvring at the time when they had come within a few ship lengths of each other. In considering the first question, their Lordships enjoy the advantage of having the main facts necessary to its determination ascertained beyond reasonable dispute. But, in so far as it bears upon the second question, the evidence from the two ships is conflicting, and, if it be reconcilable at all, cannot be reconciled without giving the witnesses on either side credit for a considerable amount of exaggeration.

In discussing the first of these questions both parties relied, with equal confidence, upon art. 32 of the regulations applicable to the navigation of the Lower Danube, which contains, inter alia, this provision: "When a vessel ascending the river finds itself exposed to meeting a vessel descending, at a point which does not afford sufficient breadth, she must stop below the passage till the other vessel has cleared it; and if the ascending vessel should be actually in the passage as the other approaches it, the descending vessel must stop above until the passage is clear."

It is a comparatively easy matter for a ship steaming against a two-knot current to come to a dead-halt without stopping her engines and without losing her steerage way. But a ship descending with the current cannot, by stopping her engines and without reversing, reduce her speed below two knots an hour; and when her speed is reduced to that limit she drifts, and her helm practically loses all control over her movements. These considerations afford an obvious reason for requiring that, in the circumstances to which the first part of the rule refers, the ascending shall give way to the descending vessel. In their Lordships' opinion, that part of the rule becomes imperative, whenever an ascending ship approaching "a point which does not afford sufficient breadth" has notice that, if she proceeds, she will be exposed to the risk of meeting a descending ship at or near that point. The second part of the rule is not, in their opinion, meant to come into operation, except in cases where the ascending ship has reached the point of danger, and has actually begun to navigate the contracted passage, before any such notice was conveyed to her.

The Sulina arm may fairly be described, throughout its whole length, as a narrow channel, its waterway being more or less contracted at various points in its course. That a "narrow pass" is not, within the meaning of the regulations, the same thing with a passage which does not "afford sufficient breadth" is evidenced by the terms of art. 36, which provides for one steam vessel overtaking and passing another "in a narrow pass." But their Lordships entertain no doubt, and their view was confirmed by the opinion of their assessors, that the short neck of contracted waterway, just below the entrance to the Sulina cut, did not, on the day of the collision, afford sufficient breadth to permit two vessels of the size and draught of the *Diana* and the *Clieveden* to navigate it at the same time with safety. They are not prepared to affirm that the channel below that point, though somewhat contracted, came within the scope of art. 32. They were advised by their assessors, in whose opinion they concur, that the *Clieveden* would have been justified in proceeding up the north side of that channel if she had stopped short of the narrow neck, leaving sufficient room for the *Diana* to pass her on the south.

Their Lordships are of opinion that the *Clieveden* could not, except through negligence, have failed to observe that, by advancing as she did, she would probably if not certainly encounter the risk of meeting the *Diana* at or near the point of danger. It was, therefore, her plain duty to stop and wait before she reached that point. No doubt, her master states that it would not have been "prudent" for the *Clieveden* to stop her engines. But the only reason which he assigns for that view is "because we intended to go out of the other channel before the other ship came in." That the *Clieveden* acted in gross violation of her duty in endeavouring to press through the narrow neck before the *Diana* could reach it does not appear to their Lordships to admit of reasonable doubt. That she was maintaining an undue rate of speed, for the purpose of attaining that object, is evidenced by the fact that, although she was going against the current, with her engines reversed, at the moment of contact, she, after collision, had still sufficient way on to push aside the stem of the *Diana* and proceed upstream.

The *Clieveden* being clearly to blame, it remains for determination whether the other colliding vessel can be acquitted of contributory fault; and, upon that point, their Lordships have been unable, upon a careful consideration of the evidence, to come to the conclusion that the *Diana* was free from responsibility.

Their Lordships attach no importance to the allegation of the *Clieveden* witnesses to the effect that the *Diana* manœuvred so as to indicate that she meant to cross the bows of the *Clieveden* and go down the north side of the cut. In order to get into her proper position on the south side of the cut, it was necessary for the *Diana*, whose course had been down the middle line of the St. George's arm, to make some use of her starboard helm; and the probable if not the inevitable result of her doing so, owing to the cross-current which prevailed at that part of the river, would be to make her head unsteady, and at times to expose her starboard instead of her port bow to the *Clieveden*. That fact ought to have been known to those who were navigating the *Clieveden*. It is difficult to suppose that they really believed the *Diana* was crossing to the north side of the channel; and, if they did entertain the belief, it was in the circumstances without justification.

It does not appear to their Lordships to be doubtful that, although the *Clieveden* was clearly wrong in forcing her way first through the narrow neck, it became the equally plain duty of the *Diana* to refrain from any attempt to exercise her right of precedence, whenever the intention of the *Clieveden* to violate the regulations became reasonably apparent. And they cannot, taking into account the evidence given by witnesses from the *Diana* herself, come to the conclusion that she fulfilled her duty in that respect. According to these witnesses, they observed that the *Clieveden* was coming up the cut at a high speed, and that she maintained her speed up to and beyond the point where she ought to have stopped and waited. The *Diana* paid no heed to these indications. Her captain says: "Even if there had been another steamer alongside the *Clieveden*, it would have been safe and practicable for them to come out, and a third to enter at the same time, with the precautions taken by the *Diana* to enter, to go slow with her engines." Accordingly she went on, intending to pass the *Clieveden*, port to port, whether the latter vessel had cleared the neck or not; and she did not stop and reverse until she saw that the *Clieveden* was coming straight into her. That, in the opinion of their Lordships, was an unseamanlike and an unwarrantable proceeding. The *Clieveden* could not, in

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the then state of the river, enter and pass upwards through the neck without coming so far towards the south side of the channel as necessarily to interfere with the course of a vessel of similar size going down that side.

Being of opinion that both vessels were in fault, their Lordships will humbly advise Her Majesty to reverse the orders appealed from; to pronounce a finding to that effect; to order that no costs be allowed to either party in the Court below; and to remit the cause for farther procedure in terms of the finding. There will be no costs of this appeal.

Solicitors for appellant: *Stokes, Saunders, & Stokes.*
Solicitor for respondent: *T. Russel Kent.*

[PRIVY COUNCIL.]

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July 18.

PLOMLEY . . . . DEFENDANT;

AND

RICHARDSON & WRENCH, LIMITED . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—16 *Vict. No.* 19, *ss.* 30, 32—*Appointment of New Trustee by the Master—Vesting.*

Where an application for the appointment of a new trustee in the place of one incapacitated is, in the opinion of the Court, duly made and served, the Court has power, under 16 Vict. No. 19, ss. 30, 32, to appoint as prayed, and also to make a vesting order. According to the rule and practice in the colony, it can direct the master to appoint, and the vesting follows the appointment without any subsequent order.

APPEAL from a decree of the Supreme Court (Feb. 20, 1893), made by the Chief Judge in Equity.

The appellant resisted a suit for specific performance of his contract of purchase of land on the ground of objections to the respondents' title, which are stated in the judgment of their Lordships.

Present:—THE EARL OF SELBORNE, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, and LORD MORRIS.

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Crackanthorpe, Q.C., and *Serrell*, for the appellant, contended that the property in suit was liable, on the face of the documents abstracted, to contribute to a certain mortgage debt, and that the claim arising thereout was not barred by the Colonial Act (8 Will. 4, No. 3), which adopted sect. 40 of the English Act (3 & 4 Will. 4, c. 27). They also contended that the legal estate in the property was outstanding. The case for the vendor was that the estate was vested in trustees, including McDonald, who, under an order of Court, had been (it was said) duly appointed a new trustee by the master. It was contended that there was merely an order of reference to the master, made in a suit in which the Court had no jurisdiction actually to appoint; that, if rule 318 and the practice of the Court validate an appointment of a trustee by the master, nevertheless, until the actual order of appointment was made within sect. 32 of the Trustee Act, 1852, there was no power in the Court to make a vesting order which would be effectual for the purpose without a subsequent conveyance. To vest the estate in the new trustee a subsequent order to that effect or a subsequent conveyance was necessary. Reference was made to *In re New Land Development Association and Gray* (1).

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the respondent, were not heard.

The judgment of their Lordships was delivered by the

EARL OF SELBORNE:—

Their Lordships do not think it necessary to hear further argument in this case. They are satisfied that the Court below was right in holding that a good title was shewn upon both the points which have been argued.

First, as to the supposed equitable charge arising out of the transaction of the 15th of August, 1864. Looking to the deed which gave effect to that transaction, it appears to their Lordships clear that the intention was this: to pay off the mortgage then held by Hart, and to take a conveyance to or for the

(1) [1892] 2 Ch. 138.

benefit of the persons who would be beneficiaries, assuming the mortgage not to exist. But there was no money available for that purpose excepting moneys in the hands of Bloomfield, as executor of the will of Francis Smith. The will of Francis Smith related only to the interests of the Smith family, and not to the interest of the Levien family, who were benefited by the transaction; and there was no power to apply the moneys of the Smith trust for the benefit of the Levien family. Therefore, if the matter is looked at as it stood at the time when that deed was executed, their Lordships would certainly agree with the counsel for the appellant in his argument that a right to be re-paid a proper proportion of the moneys, which had been advanced by one only of the families interested, would remain to that family in equity, notwithstanding the form of the deed; but the question is whether, on the facts before their Lordships, that is a claim which there could, at the present time, be any ground for making. In other words, whether it is or is not sufficiently shewn to have been satisfied or extinguished.

Now, to a certain extent, the matter is made intelligible by the statement of the appellant, which must have been founded upon information given to him; and this, it is to be observed, was not volunteered for the purpose of this particular question of the existence or non-existence of the charge, but manifestly to get rid of the attempt to set up the Statute of Limitations. "The rents were received under Hart's mortgage, notwithstanding the alleged reconveyance, for the purpose of working out the equity to contribution of the devisees of the Castlereagh Street frontage." Their Lordships do not for a moment suppose that such a statement would have been made in the correspondence between the solicitors of the vendors and the purchaser without sufficient knowledge on the part of the purchaser that the fact was so.

Their Lordships therefore start, first, with a transaction out of which such an equity would arise; secondly, with a course of action pursued for years on the footing of that equity, and with a view to work it out and satisfy it. They then come to a suit instituted in 1889, twenty-five years after the transaction—a period of time which, to say the least, would lead, under circumstances favourable to a presumption, to the presumption that the

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equity might have been worked out during that time. But it is not upon any such presumption that the matter now stands, because that was a suit by a person interested in the Levien, and not the other property, against the Smiths, who, denying his title under the original will of Francis Smith, claimed by virtue of the ultimate limitations of that will the whole of both properties—being the same persons who, as long as this equity was in existence, were entitled to the benefit of it, and whom their Lordships must take (in view of the statement made by the appellant himself as to what had been done for many years to work out the equity) to have been sufficiently informed of their own interest. The plaintiff in that suit, who succeeded in establishing his title under the will, claimed to have a conveyance made to him of the Elizabeth Street property, and in the presence of those parties, by an adverse judgment against them upon evidence an order such as he asked was made, that they should all concur in conveying to him the estate in fee simple. Either they did or they did not in that suit put the Court in possession of the facts which have given rise to this question. If they did, then the Court must have been satisfied that they had no claim which could interfere with the right otherwise established of the plaintiff in that suit to have a conveyance in fee simple, which means a conveyance free from incumbrances. If they did not bring it forward, that was their own fault, if fault at all; but the just inference is that the claim had, to their knowledge, ceased to exist, and that the means taken to work out the right to contribution had been sufficient and effectual for that purpose. A decree was made absolutely exclusive of any such claim, whether brought forward or not, binding those parties. Their Lordships think that this is a complete answer at this distance of time to the idea that any such claim can now be made.

Upon the other point, as to the legal estate, the Court below was satisfied that, by the order made in another suit or proceeding on the 9th of June, 1868, a gentleman named Charles McDonald was legally appointed a new trustee in the place of George Edward Levien, who had been absent for more than a year from the colony; and that the legal estate was vested in him, which McDonald has conveyed to the vendors, or, at all events, to their mortgagor; and as McDonald had the legal estate, that put an end to all questions upon the subject. Had he the legal estate or not? That depends upon the statute (16 Vict. No. 19), under which a new trustee could be appointed in place of a former trustee. The order making the appointment is in the record, and the points which are important are these: it purports to remove George Edward Levien from being a trustee of the will of Thomas Roberts, deceased; and if it did not appear that there were circumstances which justified that part of the order, possibly the question which their Lordships might have to consider would be different from what it is now. But in point of fact Levien was in a situation in which, under the terms of the trust, the parties to whom a power to appoint new trustees was given would have been entitled to do so; because the testator declared, that upon any vacancy in the trust by the death, resignation, residence out of the colony or absence therefrom for a twelvemonth, insolvency, or other incapacity or inability to act in the trust, it should be lawful to appoint new trustees. Levien was in one of these situations. He had been absent from the colony for more than a twelvemonth, and therefore the Court could have no difficulty in regarding him as having ceased to be able to act as a trustee. Whether the word "remove" was the proper word, or the best way of expressing it or not, is wholly immaterial, if upon the facts of the case it was plain that the Court was right in treating him as a person who could no longer be retained as the trustee. The occasion on which the order was made was manifestly a proper one, because there was a legatee unpaid for whose benefit a proper investment had been made, doubtless in the names of both trustees; and until the difficulty with regard to the absent trustee was in some way removed there might be a difficulty in dealing with the investment, and making the payment which the acting trustee, the defendant in the suit, was perfectly ready to make.

It has been suggested that the Court ought not, in a suit so constituted, to have exercised the power of appointing a new trustee. The Court had before it the acting trustee. The

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tenant for life, who would have had a voice in the matter if she had not died, died in 1863. It does not appear that any of the children who were beneficially interested were adults, and the acting trustee, by the terms of the will giving the power, would have been at least a necessary concurrent party. Therefore, there is nothing to lead to the conclusion either that it could have been exercised without his concurrence, or that there was any adult person who ought to have been consulted. But even if that were so, the Act of Parliament, which in other respects authorizes the order to be made, clearly did not require that all persons interested should be made parties under such circumstances to the suit. By the 35th section it provides, that the application for the appointment of new trustees might be made by any person beneficially interested, and it was so made. And the effect of the succeeding sections is, that as to parties, in the first instance, the petitioner might judge for himself whom he would or would not serve, and that the Court, if it thought fit, might let the case stand over for notice to be given to any person or persons; plainly leaving those matters in the discretion, first of the petitioner, and afterwards of the Court. Therefore, even if the Court might have done better in exercising that discretion, as a matter of fact, in this case it did not think it necessary to serve other parties, and their Lordships are of opinion that unless the order was ultrà vires it took effect, whether or no it might have been better for the Court to have done or required something which it did not do or require.

Then, had the Court under the Act power under the circumstances to do what it did; and was the effect of what it did to vest the legal estate? These are the only remaining questions. Their Lordships think that those questions are really determined, without going into anything else, by the 30th, taken in connection with the 32nd section. The 30th section says: "Whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Supreme Court, it shall be lawful for the Court to make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees." That

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those circumstances existed in this case their Lordships have no difficulty in assuming.

That section by itself does not enable a vesting order to be made, but the 32nd section does. It provides as follows: "It shall be lawful for the Court, upon making any order for appointing a new trustee, either by the same or by any subsequent order to direct that any lands subject to the trust shall vest in the person or persons who upon the appointment shall be the trustee or trustees for such estate as the Court shall direct, and such order shall have the same effect as if the person or persons who before such order were the trustee or trustees (if any) had only executed all proper conveyances and assignments of such lands for such estate."

Now, before noticing the argument which has been addressed to their Lordships, it seems well to observe that by the practice of the Supreme Court, now embodied in the rule 318 mentioned in the judgment of the Court below, the course was, when any reference was made to the master with a view to the appointment of new trustees, to direct the appointment to be made by the master in the first instance unless the Court should otherwise order. Accordingly, by this order the Court referred it to the master to appoint some fit and proper person to be trustee in the place of George Edward Levien, and went on to direct "that upon such appointment"—that is by the master, evidently —"the trust property and effects be vested in the defendant Richard Driver and the said new trustee upon the trusts of the will or such of them as are capable of being carried into effect." The learned judge in the Court below rightly observed that that means necessarily, for the estate proper to be in the trustees, which was an estate in fee simple. The intention of that order, and of the practice of which it is an example, was, evidently, to avoid the necessity of coming again for a subsequent order, when an appointment which nobody challenged was made. The only question is whether it was competent. But the Act of Parliament expressly says that this may be done upon making any order for appointing a new trustee. It was argued that that must mean, not on appointing, as in this case by the master, but actually appointing by the Court itself; and, therefore, that in a colony, where the practice prevailing was embodied in the rule to which reference has been made, it could only be done by a subsequent vesting order. Their Lordships think that would be placing upon the words used by Parliament an unnecessarily narrow construction, the effect of which, in a colony like this, where such a rule and such a practice prevails, would be to make it absolutely necessary in every case that the vesting should be effected, not by the same order, but by a subsequent order. But the words of this section, which are the same as those in the English Act, seem to be expressly intended to enable the Court to make an order which is to have a prospective effect, because not only is it "upon making any order for appointing a new trustee"—surely this is and must be an order for appointing a new trustee, since it directs the master to appoint one—but it may by the same order, as well as by a subsequent order, direct that the lands shall vest in the persons who, upon the appointment, shall be the trustees. If the order itself appointed the trustee it would be in the person appointed. The language seems expressly adapted to such a practice as that of the Colonial Court, whether that practice prevails or prevailed in England or not. Then, when that is done, if the Court thinks fit so to do, and makes no other direction (and in this case it has made no other direction), the effect is to be the same as if the persons who, before the order, were trustees had executed all proper conveyances. There is not a word which is not apt to authorize the thing which in this case was done, and done according to the rule and practice in the colony, namely, not merely an inquiry who shall be appointed, but an actual appointment by the master. That seems to be the most natural and convenient way of accomplishing the object and saving expense, and their Lordships do not think it does any injustice. If the persons were in contest about the fitness of the person to be appointed, there would be an appeal to the Court against the decision of the master. The decision of the master would temporarily take effect, and no doubt with the consequence of vesting; but that consequence, as well as the appointment, would come to an end if the Court thought fit to discharge the appointment. The very object being to avoid legal formalities and the expenses

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connected with them, no injustice of any sort would arise in such a case.

Their Lordships, therefore, agree with the learned judge of the Court below that there was a complete and legally effectual exercise of the power of appointing a new trustee, and that the legal estate was by means of such appointment vested in Driver and McDonald. Driver died and McDonald survived, and the title is good by McDonald's conveyance.

Their Lordships will therefore humbly advise Her Majesty that the decree appealed from is right, and that the appeal should be dismissed with costs.

Solicitors for appellant: *P. T. Gordon & Son.*
Solicitors for respondent: *Want & Co.*

[PRIVY COUNCIL.]

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July 13, 28;

DECHÈNE . . . . APPELLANT;

AND

CITY OF MONTREAL . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Quebec Act (42 & 43 *Vict. c.* 53), *s.* 12—*Expiry of Prescribed Time—Non-juridical Day.*

Where it was enacted by sect. 12 of 42 & 43 Vict. (Quebec) c. 53, that any municipal elector might demand the annulment of the corporate appropriation for expenditure within three months from the date thereof on the ground of illegality, but that thereafter the right was prescribed and the appropriation valid:—

Held, that on the expiration of the three months the elector's statutory right was at an end, and could not be extended by any procedure clause (see sect. 3 of the Civil Procedure Code) which presupposed an existing right of action and regulated its exercise.

APPEAL from a decree of the Court of Queen's Bench (June 8, 1892), affirming a decree of De Lorimier, J. (Nov. 21, 1890), dismissing the appellant's petition.

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* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and SIR RICHARD COUCH.

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The question decided in the appeal arose upon a petition presented on the 30th of June, 1886, by the appellant under Quebec Act (42 & 43 Vict. c. 53), s. 12, whether it was within time. The prescribed period expired on a non-juridical day; the petition was presented the day after.

The facts are stated in the judgment of their Lordships.

Bompas, Q.C., and *Barnard*, Q.C. (of the Canadian Bar), contended that the petition was not barred. The three months expired on the 29th of June, 1886, being admittedly a non-juridical day. Reference was made to sect. 3 of the Code of Civil Procedure, and to article 20 of 49 & 50 Vict. c. 95, being c. 1 of the Revised Statutes of Quebec. Both sections in effect extended the time allowed to the appellant till the next day. Article 20 was declared by article 1 applicable to all statutes of the Legislature unless the context forbade it. Reference was also made to an Act passed three years after the petition was filed, viz., 52 Vict. c. 79, s. 144, which gave a period of six months, and it was suggested that the appellant was entitled to the benefit of it: see *Warne* v. *Beresford* (1). The question of time was one of procedure only. Reference was made to Civil Procedure Code, art. 24; C. C. art. 2306.

The Court below was wrong in holding that the expiry of the three months operated by way of forfeiture (dechéance). If the right to present the petition in this case was, as decided by the Court below, governed by rules applicable to prescriptive rights, the French authorities did not preclude the claim made by the appellant: see Pothier on Obligations, part 3, c. 8, ss. 676, 677.

It was further contended that the resolution was incompetent as well as illegal.

Fullarton, Q.C., and *Gore*, for the respondent, were not heard.

The judgment of their Lordships was delivered by

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July 28.

LORD WATSON:—

The respondent corporation are authorized by sect. 101 of 37 Vict. (Quebec) c. 51, to make an annual appropriation for the amounts necessary to meet the expenses of municipal administration during the current year. By the same clause it is enacted that "such appropriation shall never exceed the amount of the receipts from the preceding year, added to the balance of the said receipts which have not been expended."

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(1) 2 M. & W. 848.

Sect. 12 of the Quebec statute (42 & 43 Vict. c. 53) provides that "Any municipal elector, in his own name, may, by a petition presented to the Superior Court sitting in the district of Montreal, demand and obtain on the ground of illegality, the annulment of any by-law, resolution, assessment roll or apportionment, with costs against the corporation; but the right of demanding such annulment is prescribed by three months from the date of the coming into force of such by-law, resolution, assessment roll or apportionment, and after that delay every such by-law, resolution, assessment roll or apportionment shall be considered valid and binding for all legal purposes whatsoever, provided that it be within the competence of the said corporation."

The effect of these provisions, taken by themselves, appears to their Lordships to be plain, and free from ambiguity. They confer upon each and every municipal elector the right, which he had not at common law, to challenge, on the score of illegality, any corporate appropriation of money to meet the expenses of the current year, subject to the condition that the right shall prescribe, if not exercised within three months from the time when the appropriation comes into force. They also confer upon the corporation an absolute immunity from liability to have the legality of the appropriation questioned, at the instance of any person whatsoever, after the lapse of these three months. But they do not interfere with any right existing by law to impeach the appropriation, after the expiry of the three months, upon the ground that it was beyond the competence of the corporation.

On the 29th of March, 1886, the respondents passed a by-law or resolution, which became immediately operative, appropriating the sum of $1,922,173 to the expenses of the current year. Upon the 30th of June, 1886, the day after the period of three months expired, the appellant, who is a municipal elector of the City of Montreal, presented a petition to the Court praying for

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annulment of the appropriation to the extent of $136,000 36 cents, which sum was alleged to be in excess of the limit prescribed by the Act 37 Vict. c. 51. The last day of the three months was the feast of St. Peter and St. Paul, which, by sect. 2 of the Civil Procedure Code, is declared to be non-juridical. In defence, the respondents, whilst disputing the allegations upon which the petition was founded, pleaded that it was out of time.

The parties arranged that, before entering into the merits of the case, the judgment of the Court should be taken upon that plea, and that, for the purpose of raising the plea, it should be assumed that, in making the appropriation the corporation had exceeded the limit of their statutory power by the sum of $136,000 36 cents. His Honour Judge De Lorimier, in the Court of First Instance, sustained the plea and dismissed the petition. On appeal, his decision was unanimously affirmed by five learned judges of the Court of Queen's Bench.

The arguments submitted by the appellant to the Court of Queen's Bench are summarized in the case which he has laid before this Board, to which it may be convenient to refer. As therein stated, he pleaded: (1.) That the resolution complained of was not within the competence of the municipal council. (2.) That the question of the delay within which the petition could be presented was one of civil procedure. (3.) That the law making valid an act done on the next judicial day, where the last day on which it could be otherwise done was a holiday, applied in all cases, and not only in matters of civil procedure. (4.) That the Act extending the time for presenting a petition to six months applied to the present case." These pleas cover the whole points which were discussed in the lengthened argument addressed to their Lordships in support of this appeal. The second and third of them are the only pleas which can be regarded as having any substance or any relevancy to the preliminary question of title which the parties agreed to try before the facts were investigated.

To begin with the first of these pleas, it is true that an incompetent resolution must be illegal; but it does not follow that an illegal resolution must be beyond the competence of the council.

In this case, the resolution sought to be impeached was plainly within their competence, seeing that it exclusively relates to matters committed to the council by statute. Even if it had been incompetent, that circumstance could not enable the appellant to bring a petition for its annulment after the expiry of the three months. After the lapse of that period, the right conferred upon a municipal elector by 42 & 43 Vict. c. 53, s. 12, is at an end; though the incompetent resolution remains open to challenge, at the instance of persons who have a proper title.

The fourth plea is to the effect that the time allowed to the appellant for bringing this suit, by 42 & 43 Vict. c. 53, was enlarged to six months by the Quebec Act (52 Vict. c. 79), s. 144. The plea is sufficiently refuted by stating these two facts. The three months allowed to the appellant ran out, according to his own contention, upon the 30th of June, 1886. The Act upon which the plea is founded was passed about two years after that date.

The second and third pleas may be treated as one. They are meant to express the proposition that, by the law of the province of Quebec, the 29th of June, 1886, being a non-juridical day, the three months' period was extended to the next day, which was juridical. The appellant maintains that the right given to him by the 12th section of 42 & 43 Vict. c. 53, is substantially a matter of procedure; and, in the event of its being held otherwise, that the same rule which obtains in matters of procedure has been extended by statute to the time limited for the prescription of any right of action.

The respondents do not dispute that, when an action is depending, the rule upon which the appellant relies is applicable to proceedings in the litigation. But they maintain that the statutory title of the appellant to petition the Court and their own statutory immunity, which arises immediately upon the cesser of his title, are matters of right, and not of procedure; and that the prescription by which his title is cut off and their immunity established is regulated by the provisions of the Civil Code.

The rule for which the appellant contends is to be found in sect. 3 of the Code of Civil Procedure, which enacts as follows:

"If the day on which anything ought to be done in pursuance of the law is a non-juridical day, such thing may be done with like effect on the next following juridical day." In the opinion of their Lordships, that enactment refers exclusively to things which the law has directed to be done, either by the plaintiff or the defendant, in the course of a suit, and has no reference to the title or want of title in the plaintiff to institute and maintain it.

The enactment upon which the appellant chiefly relied is sect. 20 of the Quebec statute (49 & 50 Vict. c. 95). The statute did not become law until the 25th of August, 1886, nearly two months after the present petition was brought, but is said to be declaratory. Sect. 20 is in these terms: "If the delay fixed for any proceeding or for the doing of anything expires on a non-juridical day, such delay is prolonged until the next following juridical day." The section appears to their Lordships to be essentially a procedure clause, and to be, in substance, a re-enactment of sect. 3 of the Code of Civil Procedure. Its language is not calculated to suggest that a claimant may bring an action for recovery of land after the period of limitation has run if he can shew that the last day or days of that period were non-juridical, and that his claim is preferred upon the first juridical day after its expiry. Yet that would be the logical result of giving effect to the argument of the appellant.

Their Lordships are satisfied that no question of procedure is raised by the circumstances of the present case; and they are also of opinion that sect. 12 of 42 & 43 Vict. c. 53, is not controlled either by the Code of Civil Procedure or by sect. 20 of the Act 49 & 50 Vict. c. 95. The latter clause is qualified by sect. 1 of the same Act, which provides that the enactments which it contains, including sect. 20, though otherwise applicable, shall have no effect against any other statute, in so far as they may be inconsistent with the object, the context, or any of the provisions of such statute. Even if sect. 20 were primâ facie applicable to the present case, their Lordships venture to doubt whether, having regard to that reservation, it could be permitted to control the plain intendment of the Legislature as expressed in the clause which gives a right of challenge to the appellant;

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but in the view which they take it is unnecessary to decide that question.

Their Lordships have to express their concurrence in the reasons rendered by the learned judges in both Courts below. They will humbly advise Her Majesty to affirm the judgments appealed from, and to dismiss the appeal, the costs of which must be paid by the appellant.

Solicitors for appellant: *Carr & Martin.*
Solicitors for respondent: *Wilde, Berger, & Moore.*

[PRIVY COUNCIL.]

J. C.*
1894
June 27, 28;
July 28.

S.S. "NORD KAP" (DANISH) . . . . . APPELLANT;

AND

S.S. "SANDHILL" (BRITISH) . . . . . RESPONDENT.

THE "SANDHILL."

ON APPEAL FROM HER BRITANNIC MAJESTY'S SUPREME CONSULAR COURT, CONSTANTINOPLE.

Collision—Crossing the Bows of the Appellant—Duties of either Vessel.

Where two steamships entered the Bosphorus from the Black Sea at the same time, both making at about equal speed for a point on the Asiatic side, and on reaching that point the respondent, being on the European side, crossed the bows of the appellant, notwithstanding the proximity of the land, the set of the current, and the fact that neither vessel had on it at the time much steerage way:—

Held, that the Court below was wrong in pronouncing the appellant solely to blame for the collision. The respondent was to blame in the first instance, but the appellant was also in fault for not having reversed at once when the respondent's object was or ought to have been apparent.

APPEAL from two decrees of the Supreme Consular Court (July 15, 1893) in a cause of collision brought by the appellant and a cross cause by the respondent.

The facts are stated in the judgment of their Lordships.

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* *Present:*—LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and SIR RICHARD COUCH.

The Court below held that the appellant was alone to blame for the collision. The judge relied on *The Esk and The Niord* (1), and was of opinion that, "whatever may have been her rights, or whatever course she might have taken, had no other vessel been in the way, it was clearly the duty of the *Nord Kap* to observe the *Sandhill*, to see whether she was taking that course which persons acquainted with the navigation of the Bosphorus must have known to be the ordinary course, and to conduct her own manœuvres accordingly. He held, further, that the *Nord Kap* was an overtaking ship within the meaning of art. 20 of the Regulations for Preventing Collisions at Sea, and was therefore bound to keep out of the way of the *Sandhill*. He further held the *Nord Kap* to blame for not reversing her engines.

Sir *Walter Phillimore*, Q.C., and *Stokes*, for the appellant, contended that the case of *The Esk and The Niord* (1) had no application. The appellant was not an overtaking ship within the meaning of art. 20 of the above regulations; if she were, the respondent was to blame for not keeping her course according to art. 22. When the respondent starboarded her helm it was impossible for the appellant to avoid a collision by reversing her engines. The respondent gave no signal of the manœuvre she was going to adopt; and the appellant, on discovering it, did all in her power to prevent a collision. Reference was made to *The Dora and The Caprivi* (2); *The Saragossa* (3); *The Franconia* (4).

Aspinall, Q.C., and *Butler Aspinall*, for the respondent, contended that, whether the ships were crossing or overtaking, it was the duty of the appellant to have kept clear of the respondent. The starboarding of the respondent was not in the circumstances an alteration of her course; while the appellant was racing to get to Kavak, and never stopped or reversed her engines in due time. Reference was made to arts. 16, 18, and 20 of the above regulations, and it was contended that the appellant infringed them, and that the respondent was not to blame

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(1) Law Rep. 3 P. C. 436.

(2) *Shipping Gazette*, May 20, 1893.

(3) 7 Asp. M. C. 289.

(4) 2 P. D. 8.

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for starboarding as she did. Reference was made to *The Molière* (1) and to *The Palinurus* (2).

Stokes, replied.

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Lord Macnaghten:—

This is an appeal from a judgment and from two decrees or orders of the acting judge of Her Majesty's Supreme Consular Court, Constantinople, sitting in Vice Admiralty in a cause of collision brought by the *Nord Kap* against the *Sandhill*, and in a cross cause brought by the *Sandhill* against the *Nord Kap*.

The two causes were heard at the same time and upon the same evidence. Only one judgment was delivered, but separate decrees or orders were made.

The collision occurred in the Bosphorus about midday on Sunday, the 12th of February, 1893.

The *Nord Kap* is a Danish steamship about 250 feet in length. The *Sandhill* is a British steamship of 1335 tons register. The length of the *Sandhill* is not stated in the evidence, nor is the tonnage of the *Nord Kap*. It was assumed that the two vessels were of about the same length and tonnage.

The two vessels entered the Bosphorus from the Black Sea about 11.30 A.M., the *Nord Kap* on the Asiatic side, the *Sandhill* on the European side, and a little in advance. Both vessels were making for Kavak Bay for the purpose of obtaining pratique and taking a pilot on board.

Kavak Bay is on the Asiatic side of the Bosphorus immediately below Kavak Point, which is about one mile from the entrance from the Black Sea. There is a quarantine establishment there. All vessels bound for Constantinople, as these vessels were, are required to obtain pratique at Kavak Bay.

The *Sandhill* was coming down the Bosphorus at half-speed. Finding that the *Nord Kap* was gaining upon her the master of the *Sandhill* put on full speed, and then, when he had got a lead

(1) [1893] P. 217.

(2) 6 Asp. M. C. 271.

of about two lengths, he slackened speed again, and the *Nord Kap*, going a little faster, somewhat lessened the distance.

On nearing Kavak Point both vessels seem to have easied and then stopped their engines.

A current sets through the Bosphorus from the Black Sea. There is no evidence as to the strength of the current at the time of the collision. It was assumed to be running at about the rate of two miles an hour—an estimate probably below the mark.

The position of the vessels at Kavak Point seems to have been this: The *Nord Kap* was still on the Asiatic side about two lengths from the shore. The *Sandhill* was about a length and a half from the *Nord Kap* on her starboard bow and about a length in advance. Neither vessel had much way on, both intending to bring up in Kavak Bay. But the *Nord Kap* was moving perhaps a little faster than the *Sandhill*.

The *Sandhill* then starboarded, meaning to cross the bows of the *Nord Kap*, and to select her own position in the bay regardless of the situation of the *Nord Kap*. The *Nord Kap* starboarded also, meaning to keep the inside position, and moved her engines two or three revolutions to get steerage way. Then, finding that there was no room to go inside and that the *Sandhill* was actually crossing her bows, she reversed her engines. But before she could get any stern way on she ran into the *Sandhill* about the fourth hatchway, and both vessels were injured.

The acting judge, who had not the assistance of nautical assessors, found that the *Nord Kap* alone was to blame.

Their Lordships' opinion is that neither vessel can be absolved from blame. Each vessel was intent on taking up the most favourable position. The view of the master of the *Sandhill* was that, as he had reached Kavak Point before the *Nord Kap*, he was master of the situation. "I did not notice her," he said; "we don't take a following steamer in consideration; we look out ahead. She looks out for herself." In crossing the bows of the *Nord Kap* he executed a most dangerous manœuvre—a manœuvre rendered doubly dangerous by the proximity of the land, the set of the current, and the fact that neither vessel had on it

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much steerage way. The *Sandhill* was to blame in the first instance. But their Lordships are also of opinion that the master of the *Nord Kap* was not free from blame. If he had not been so intent on cutting out the *Sandhill*, and had reversed at once when the object of the *Sandhill's* manœuvre was or ought to have been apparent to him, the probability is that the collision would have been avoided.

Their Lordships think that the orders of the Consular Court should be discharged, that both vessels should be pronounced to have been in fault, and that the causes should be remitted to the Consular Court for the purpose of ascertaining damages upon that footing, and that there should be no costs in the Court below or of the appeal to this Board.

Their Lordships will therefore humbly advise Her Majesty accordingly.

Solicitors for appellant: *Stokes, Saunders, & Stokes.*
Solicitors for respondent: *Botterell & Roche.*

[PRIVY COUNCIL.]

J. C.*
1894
June 9.

KOPS . . . . APPELLANT;

AND

THE QUEEN . . . . RESPONDENT.

Ex parte KOPS.

FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—Criminal Appeal—New South Wales Criminal Law and Evidence Amendment Act (55 *Vict. No.* 5).

Where a prisoner applied for special leave to appeal in a criminal matter on the ground that the judge misdirected the jury in commenting upon the prisoner having refrained from giving evidence:—

Held, that such comment was according to law, and that the Criminal Law and Evidence Amendment Act did not preclude it.

Ex parte Deeming ([1892] A. C. 422) followed.

THIS was a petition for special leave to appeal in formâ pauperis from a judgment of the Supreme Court dated the 24th

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* *Present:*—THE LORD CHANCELLOR, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

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of July, 1893, upholding a conviction of the petitioner on the 20th of March of that year under sect. 182 of the Criminal Law Amendment Act, 1883 (46 Vict. No. 17), at Quarter Sessions at Cowra.

The petition alleged that the chairman commented to the jury on the petitioner not having given evidence which he was competent but not compellable to do under sect. 6 of 55 Vict. No. 5, and told the jury that "they might draw an inference adverse to me from my having omitted to deny on oath certain statements by the witnesses, and to explain certain matters which when unexplained were suspicious against me;" that a special case was reserved whether the chairman was right in so commenting; that there was a difference of practice on this subject between the judges of the Supreme Court, and also between chairmen of quarter sessions; that on that account, and also because the question affected the administration of justice in every case, the special case had been argued and decided by a Full Court consisting of all seven judges.

Shearman, for the petitioner, contended that this was an exceptional case in which leave should be granted. The question had been treated by the Court below as one of great and general importance; its difficulty was apparent from the judgments of Innes and Stephen, JJ., who dissented from those of the majority. The comment complained of was not a general one, but in respect of particular facts proved by the prosecution, and unexplained by the prisoner. The dissentient judges were right in saying that while the Act made a prisoner competent but not compellable, liability to judicial comment of this kind amounted to an indirect compulsion. The constitutional right to claim an acquittal in the absence of direct proof of guilt was not taken away by the statute; but the comments complained of rendered primâ facie evidence sufficient unless rebutted by the prisoner.

[LORD MORRIS:—It is a matter of every-day comment that witnesses have not been called to disprove facts; and before this Act comment might have been made that no explanation had been suggested.]

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In the analogous Acts (South Australian Act, 45 & 46 Vict. No. 245, s. 1, and New Zealand Act of 1889, No. 16, s. 4) a proviso is introduced that no presumption of guilt shall arise from a prisoner refusing to give evidence. This Act does not contain that proviso, and should be construed favourably to the prisoner.

[The Lord Chancellor:—"Competent and compellable" occur in sect. 2 of Lord Denman's Act (14 & 15 Vict. c. 99). "Compellable" there means compellable by process of law. So here.]

The question affects the conduct of every criminal trial in the Colony, and raises a question of principle on which the Full Court differed.

The judgment of their Lordships was delivered by

The Lord Chancellor:—

This is a petition for special leave to appeal in a criminal matter. In the case of *Ex parte Deeming* (1), which was a petition for a similar indulgence, the then Lord Chancellor, delivering the opinion of the Board, quoted from the judgment in *Dillett's Case* (2) the following passage, of which their Lordships entirely approve: "The rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shewn that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

The point on which special leave to appeal is sought in the present case is whether upon the trial of a prisoner since the passing of the New South Wales Criminal Law and Evidence Amendment Act (55 Vict. No. 5) it is legitimate for the judge, in commenting upon the facts proved, to refer to the capacity of the prisoner to give evidence on his own behalf, and so explain matters which would be naturally within his own knowledge, and of which an explanation would be important in view of the evidence already given. The argument would have to go, and did go, to this length—either that in no case is a judge entitled to comment upon the prisoner having refrained from giving evidence, or that in this particular case there were circumstances rendering such a comment illegitimate in point of law.

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(1) [1892] A. C. 422.

(2) 12 App. Cas. 467.

The majority of the learned judges of the Full Court have held that the comments made by the learned judge at the trial in this case were made according to law, and that there was no reason to interfere with the verdict which followed.

Their Lordships see no reason to doubt the correctness of the conclusion at which the majority of the Court arrived. The learned judges did not lay down—it was not within the scope of the case necessary to lay down—any general rule as to such comments. There may no doubt be cases in which it would not be expedient, or calculated to further the ends of justice, which undoubtedly regards the interests of the prisoner as much as the interests of the Crown, to call attention to the fact that the prisoner has not tendered himself as a witness, it being open to him either to tender himself, or not, as he pleases. But on the other hand there are cases in which it appears to their Lordships that such comments may be both legitimate and necessary.

It has been argued on behalf of the petitioner that the words "not compellable" are used in the Act, and that these words indicate an intention that no such comments as those made by the learned judge who tried this case should be made to the jury; and this appears to have been the view of the minority of the learned judges in the Court below.

In their Lordships' opinion—having in view the fact that in the English Act to amend the law of evidence (14 & 15 Vict. c. 99), which enabled parties to tender themselves as witnesses, or be called as witnesses in civil actions, the provision was that parties should be both "competent and compellable" to give evidence—when subsequent legislation introduced in part the same capacity as regards criminal cases, rendering the accused competent but not compellable to give evidence, the word "compellable," which in the earlier statute obviously meant "compellable by process of law," must in the subsequent legislation have the same meaning, and not any more extended meaning, such as that which has been contended for here.

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Consequently the argument founded upon the use of the words "not compellable" cannot prevail.

Their Lordships will therefore humbly advise Her Majesty that this petition must be dismissed.

Solicitors for the petitioner: *Shearman & Rayner.*

[PRIVY COUNCIL.]

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HIRSCHE AND OTHERS . . . . . . DEFENDANTS;

AND

SIMS AND ANOTHER . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Law of the Cape of Good Hope—Powers of Directors—Issue of Shares at a Discount—Damages.

Held, in this case, that it was not competent for directors to issue shares at a discount, so as to make the holder liable for less than their full amount.

Where directors bonâ fide agreed, in consideration of a stipulated service, to allot shares at a discount and the allottee subsequently received certificates of fully paid-up shares, paid to the company the par value less 10 per cent. discount, and subsequently sold the same to bonâ fide purchasers at a profit:—

Held, that the directors were answerable to the company for the discount allowed;

But *held*, that they were not liable beyond the discount, there being no proof of fraud against the company, or of further resulting damage to it from the transaction.

Semble, such further resulting damage could not have exceeded the difference between the price paid by the allottee and the presumable value of the shares at the date of the agreement if it and the transactions founded thereon had never taken place.

APPEAL from a decree of the Supreme Court (March 2, 1893) varying a judgment of the High Court of Griqualand (Dec. 15, 1893).

The facts of the case and the proceedings in the suit are stated in the judgment of their Lordships.

* *Present:*—THE EARL OF SELBORNE, LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and SIR RICHARD COUCH.

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The Attorney-General (Sir *John Rigby*), *Finlay*, Q.C., and *C. E. Jenkins*, for the appellants, contended that the evidence shewed that the contract entered into between the directors and Oats was entered into in good faith, and was valid and binding on the parties thereto. It was also within their powers, and on this point reference was made to the articles of association, No. 106, sub-sect. 3, and to Act XXV. of 1892, s. 97.

Sir *Edward Clarke*, Q.C., *Cozens-Hardy*, Q.C., and *Dobb*, for the respondents, contended that the agreement in question must on the evidence be held to be unlawful and fraudulent, as well as ultrà vires the directors. Upon the measure of damages and the liability of directors, reference was made to *Eden* v. *Ridsdales Railway Lamp and Lighting Company, Limited* (1); *Weston's Case* (2); *McKay's Case* (3); *Oceanic Steam Navigation Company* v. *Sutherberry* (4); *Clay* v. *Rufford* (5); *Nant-y-Glo and Blaina Iron Works Company* v. *Grave* (6).

Finlay, Q.C., replied.

The judgment of their Lordships was delivered by the

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EARL OF SELBORNE :—

The action in this case was brought in December, 1891, by the respondents, as trustees for the "Orange River Asbestos and Land Company, Limited" (a company established at Kimberley in South Africa, and registered under that name on the 16th of December, 1889), against the appellants and two others, Voelklein and Haarhoff, who had been directors of the "Griqualand West Copper and Mineral Mining Syndicate, Limited," under which name the business of the plaintiffs' company was carried on from the 5th of February, 1889, to the end of that year. The principal ground on which relief was sought against the appellants is set forth in paragraphs 9 to 12 of the plaintiffs' declaration, which are as follows:—

"9. The plaintiffs further say that on or about the 8th day of

(1) 23 Q. B. D. 368.
(2) 10 Ch. D. 579.
(3) 2 Ch. D. 1.
(4) 16 Ch. D. 236.
(5) 5 De G. & Sm. 768.
(6) 12 Ch. D. 738.

August, 1889, when the said company carried on business as the Griqualand West Copper and Mineral Mining Syndicate (Limited), the defendants as such directors as aforesaid engaged the services of one Francis Oats to report on the farm Zoetvlei, the property of the said syndicate, for which report the defendants promised to give the said Oats the option of purchasing at par ten thousand reserved shares of the said syndicate of the nominal value of £1 each, such option to expire on the 23rd of August, 1889; and further promised that in the event of the said Oats purchasing the said 10,000 shares the defendants would pay him £1000.

"10. The said Oats inspected the said farm Zoetvlei, and reported favourably but incorrectly thereon to the defendants on the 19th of August, 1889, and on the 23rd of August in pursuance of the aforesaid agreement the defendants delivered to the said Oats 10,000 shares of the said syndicate which were then of the value of 48*s.* 6*d.* per share, and paid him the sum of £1000.

"11. The aforesaid contract between the defendants and the said Oats under which the said shares were delivered to the said Oats was wrongful, unlawful and fraudulent, and was made by the defendants not in the interests of the said syndicate, but to induce the said Oats to make a favourable report on the said farm, so that the shares of the said syndicate might rise in value and enable the defendants who were large shareholders in the said syndicate to benefit themselves thereby.

"12. The plaintiffs submit that the delivery of the said 10,000 shares, the property of the said syndicate, by the defendants to the said Oats, was wrongful, unlawful and fraudulent, and that the plaintiff company is entitled to recover from the defendants the difference between the value of the said shares on the 23rd of August, 1889, to wit, £24,250, and the amount received for them from the said Oats, to wit, £10,000, such difference being £14,250. The plaintiffs further submit that they are also entitled to recover the sum of £1000 from the defendants."

There were some other matters, in respect of which relief was not obtained; of these no notice need be taken. The High Court of Griqualand, on the 15th of December, 1892, gave relief, to the extent of holding the appellants liable for £1000, the difference between the par value of the shares taken by Francis Oats and the sum of £9000 paid by him to the company; Laurence, J., president of that Court, thinking that there was no "clear proof either of fraud as against the company in the agreement with Oats, or of resulting damage to the company." Solomon, J., the other judge, also held that the charge of fraud was not proved, but thinking that the defendants, as directors, were not justified in the delivery of the shares to Oats on the 23rd of August, 1889, and that the proper measure of damages was the price of the company's shares on that day, as quoted in the Kimberley share market, he would have given judgment against the appellants for £11,875. In the Court of Appeal (the Supreme Court of the Cape of Good Hope) a case of fraud was held to be established, and judgment was given against the appellants on the 2nd of March, 1893, for £10,875, which sum the plaintiffs declared their willingness to accept, although (but for that concession) the Court would have given them £14,250, the amount claimed in their declaration.

Their Lordships are of opinion that the appellants were properly held liable, in the High Court of Griqualand, for the difference between 9000*l.* and the par value of the shares; and that the real question upon the present appeal is, whether they ought to be held liable for more.

The bargain with Francis Oats is admitted to have been, that he should have the option for a fortnight, in consideration of the service he was to render, of taking the 10,000 shares in question at a discount of 10 per cent.; though the lawyers who drew up the agreement of the 8th of August thought it prudent to give it the form which it there assumes. It was not, in their Lordships' opinion, competent for the directors to issue those shares at a discount, so as to make the holder liable for less than their full amount. Oats received certificates for the 10,000 shares as fully paid up; and, on the faith of those certificates, all those shares afterwards passed into the names of bonâ fide purchasers from him (or from his agent and partner Hinrichsen), as against whom the company is estopped from saying that they were not fully paid up. Under these circumstances (unless the larger claim has been made out), the appellants, as directors who issued those shares, are, in their Lordships' opinion, answerable for the difference between the £9,000 paid and the par value.

The question whether the company is entitled to the larger relief given by the Court of Appeal depends on particular facts, and the inferences proper to be drawn from them. The plaintiffs have been content to rely on the statements (chiefly on cross-examination) of the defendants themselves and of Oats and Hinrichsen, and on the documents filed in the cause. They have sought no relief against Oats or Hinrichsen in this action or otherwise.

The company, under its original name, was registered on the 1st of February, 1889, and had, before July in that year, acquired certain properties, which do not appear to have been profitable. Its nominal capital was 80,000 shares of £1 each, of which all but 15,000 were either taken by the promoters, or issued to the public; 15,000 being reserved for future allotment. No dividend was ever paid; and the only market for the shares (now valueless) appears to have been at Kimberley, a small place, which, in consequence chiefly of the neighbourhood of diamond fields and gold fields, was the centre of various speculative undertakings. One of the exhibits in the cause, much relied upon by the respondents, is a certified extract from the books of the "Kimberley Share Dealers and Brokers Association," shewing "all the official stock exchange quotations relating to the dealings in the shares of the Griqualand West Copper and Mineral Company (Limited) between the 1st of July and the 30th of October, 1889"; by which it appears, that in that market there were no actual sales of those shares during July, except at a discount of 50 per cent., or more; and that the August quotations, down to the 8th, were very little higher, without any actual sale at more than 12*s.* per share. On the 8th of August the morning quotation was 14*s.*; that in the afternoon 18*s.*; at which prices there were some actual sales. The rise went on, by rapid steps, till the 22nd of August, when the price of 50*s.* 6*d.* was reached; afterwards there was a gradual decline, beginning with 48*s.* 6*d.* on the 23rd of August; but the shares continued above par till the end of October.

There is some danger, even in a Court of Justice, of the mind being too much affected by the unfavourable impression produced by an atmosphere of speculation, such as that which prevailed at Kimberley in 1889; of which the influence, upon all the parties to the transaction called in question by this suit (unless Mr. Weingarten be an exception), is sufficiently manifest. For this, as well as other reasons, their Lordships have thought it their duty to examine closely the evidence on which their judgment ought to depend.

The purchase of the Zoetvlei farm, between 120 and 150 miles from Kimberley, by the company from two of the defendants, Hirsche and Weingarten, and certain other persons, was the cause which gave occasion for the agreement with Oats of the 8th of August, 1889. It was made about the middle of July, 1889, and was ratified, at the same time with that agreement, by the board of directors on the 21st of August. Its good faith and validity have not been impeached, except by questions addressed to some of the defendants in this suit, on cross-examination. Their Lordships see no reason to doubt that this purchase was made under a bonâ fide belief that it would be profitable to the company. The farm had been acquired by the vendors in 1888, from an insurance company at the Cape, for £4500; and something more was afterwards spent by them on it. The Griqualand Company took it over as at cost price, with a stipulation for a further payment to the vendors out of profits, if made. It contained a large deposit of the mineral called asbestos, which, if suitable in quality to the English or European markets, might have proved very valuable. Some samples, obtained near the surface, had been sent in 1888 to Hamburg and to London, and had been condemned as too brittle for those markets. But to the London opinions upon them it was added, that it was consistent with experience that the quality might improve as the workings got deeper; and of other samples, which were sent to Cardiff in May, 1889, a very favourable opinion was given.

Mr. Francis Oats was a mining engineer, well known at Kimberley, who had held important appointments, and stood high in his profession; a man of substance, and in all respects of good reputation; not indeed qualified as an expert to pronounce upon the commercial value of the mineral, but whose report upon it, as a mining engineer, might be trustworthy and valuable. The agreement with him was, that he should go to Zoetvlei and report upon it; and that, for that consideration, he should have, for a fortnight reckoned from the 9th of August, 1889, the option of taking 10,000 of the company's reserved shares, at 2*s.* less than the par value; being 4*s.* more than the highest price at which they had, until then, been quoted. To allow that time was not, in the opinion of their Lordships, unreasonable or beyond the power of the directors, if acting in good faith. If, on the other hand, the intention was (as alleged by the plaintiffs) to bribe Oats to make a favourable report, the givers and the receiver of such a bribe would be equally culpable, and a remedy might have been sought against Oats as well as the directors. But, although Oats was a man of substance and had made a large profit by selling the shares, no proceeding has been taken against him. The bona fides of his report, as made on the 19th of August, has not been seriously (if at all) called in question. Under these circumstances, their Lordships cannot presume bad faith, without cogent proof, against a man not called upon to defend himself; and they think that the onus of proving it against the directors, who made or who ratified the agreement, must be satisfied in some other way than by mere inference from the terms of the agreement itself; though they do not approve of the form which it was made to assume.

The plaintiffs' case is, that, in making that agreement on the 8th of August, the defendants acted with a view only to their own interest as shareholders desirous of making a profit out of their shares, and not with any view to the interest of the company. Of that case there is no direct evidence; it is denied positively on oath by all the defendants who took part in negotiating the agreement; and the question is, whether facts have been proved from which, notwithstanding that denial, it ought to be inferred. If the true effect of the whole evidence is, that the defendants truly and reasonably believed at the time that what they did was for the interest of the company, they are not chargeable with dolus malus or breach of trust merely

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because in promoting the interest of the company they were also promoting their own, or because they afterwards sold shares at prices which gave them large profits.

Mr. Oats and his attorney (and partner in the profit derived from this transaction) Mr. Hinrichsen, though not defendants, are witnesses in the cause, and they were not cross-examined as if their credit was meant to be called in question. To their evidence their Lordships will first refer, premising that the negotiation with Oats was throughout conducted and concluded by the defendant Hirsche on behalf of himself and his co-directors, King and Voelklein. They were consenting parties to the agreement; and all three afterwards concurred with Weingarten (who lived at some distance) in ratifying it at the board meeting of the 21st of August, and in authorizing the delivery of the 10,000 shares. That the company, after completing the purchase of Zoetvlei, had not more than £2000 or £3000 left available for working the asbestos, or for their other operations, is a fact not in controversy.

Oats' account of the matter is, that, when it was first proposed to him that he should visit Zoetvlei and report on the mineral deposit, he said, "It was an awkward place to go to, and, having no interest in the company, I should expect to be well paid"; to which the reply was, that "they were short of funds"; and that he then himself made the suggestion that "they might compensate me by giving me the refusal of an interest." "I suggested" (he says) "the refusal of a small interest at market rates. They insisted on my taking a refusal of not less than 10,000 if any." And, on cross-examination, "I did not think it a very good bargain when I made it. Thought the odds were against my exercising the option." He denied that any inducement was held out to him to report favourably, and said that his report "was simply based on what he saw, and made for no ulterior motive."

As to the state of the market and the sales made for him by Hinrichsen during his absence from Kimberley, he said that, "when the discussion began, the shares were at 11*s.* or 12*s.* They had begun to rise and went on rising during discussion." Hinrichsen sold about 7000 of them; he thought, mostly to

King; they were not "worth keeping at the price they went to"; ". . . . the rest of my shares were then placed in the pool." . . . "Think I arranged with Hinrichsen to sell at 25*s*." Hinrichsen says that Oats did not consult him about the arrangement with the company, but only told him about it afterwards. While Oats was away, no communication between them took place, or was possible. "He told me I should do the best for his interest in his absence; it was at my suggestion that he gave me these instructions. The shares went up rapidly. I signified to the directors he would exercise the option, while he was absent, about a week after his departure. I sold most of the shares, these very shares, about this time, at 35*s*. The shares rose from the 8th to say the 16th; and by that time I had sold pretty well half of the 10,000 shares. I sold subsequently about 1,500 more; and the rest I pooled with Mr. King. . . . I sold the shares openly in the market; everyone knew it was Oats' shares. It did not strike me that his selling would create suspicion in the minds of the public. . . . I should say, Mr. Oats made between £6000 and £7000 profit out of the sale transaction of the shares. This would be including the £1000."

This estimate must represent the whole profit made by the sale of the 10,000 shares, and not merely Oats' portion of it, as between himself and Hinrichsen; about half of them (according to the same evidence) having been sold at 35*s*., and 3000 or more having been "pooled" after the market began to decline. If the "pooled" shares were sold after the 16th of September (as may be inferred from Weingarten's statement, that he received what was due to him from the produce of the "pool" in October), they realized less than 35*s*. per share. It would not be safe to draw conclusions from Oats' impression (which is not corroborated by other evidence), that most of the shares sold by Hinrichsen before "pooling" the rest were purchased by the defendant King. Nor do their Lordships think that any inference unfavourable to the parties concerned ought to be drawn from the fact that the certificates for the 10,000 shares, which were originally prepared in the name of Oats, were issued in that of Hinrichsen. It seems obvious that the relations between Oats and Hinrichsen, and the frequent and necessary absence of Oats from Kimberley (he says he was there only for a day or two after his return from Zoetvlei), may have made this convenient, and, if Hinrichsen speaks truth, there was no disguise about the fact that the shares sold by Hinrichsen belonged to Oats.

The evidence of these witnesses does not appear to their Lordships to be wanting in candour; and they see no reason to disbelieve it. It is confirmed, in all the material points which must have been matter of common knowledge to Oats and the defendants, by what the defendants say. It might at first sight seem that the instructions given by Oats to Hinrichsen as to selling, if the market price should reach 25*s.*, ought to discredit his statement that he thought "the odds were against" his "exercising the option." But such a contingency might be provided for without an expectation that it would happen. The defendants King and Hirsche both say, in effect, that such a rise as took place after the 8th of August could not at that time reasonably have been anticipated, and they refer to their own acts as shewing that they did not expect it. King says that he sold some thousands of shares at about 15*s.*; and Hirsche, that he accompanied Oats to Zoetvlei without leaving any instructions as to his shares. It was with Hirsche alone that Oats had any direct communication; and, whatever profit Hirsche may have made out of the shares which he sold, he was at all events in no haste to sell; and both he and King and Weingarten retained to the last a large number of shares unsold. Hirsche had in his name, from the commencement of the company's operations, a great many shares, of which he says that the chief part belonged to or were distributed by him amongst other persons, and that he retained at his own disposal about 8900, of which only one-fourth were his own, and that of those 8900 he still held about four-fifths when his evidence was given. His share accounts, extracted from the company's registers, are in evidence: they shew, that between the end of July and the end of September, 1889, he sold only 2050 shares, and of these only 325 in August; and that at the end of that year 20,528 shares remained in his name, out of which (about 850 having been acquired by purchase in December) 6198 remained when the company was reconstituted under its new name, and he then increased his interest, and in April, 1892, held 11,819 shares.

As to the bona fides of the agreement with Oats, Hirsche says: "I decidedly considered that this arrangement with Oats was for the interest of the company. I thought that, if he reported favourably, he would exercise his option, and the company would get £9000, which would materially strengthen its financial position, and enable it to work on a larger scale; while, if he reported unfavourably, the company would be no loser. . . . I had no conversation with Oats during the journey, either to or from the farm, as to his report on the prospecting, and did not influence him in any way. . . . Apart from the special agreement with Oats, I should have considered the bargain with him good business in the financial position of the company" (meaning, as he explained in answer to a question by the Court, "in connection with getting this report, and not independently of it") . . . . "I do not now consider this was a most imprudent contract; would make a similar one again."

These statements of Hirsche are corroborated by those of the defendants King and Voelklein, which are equally strong and distinct. Hirsche was in frequent communication with King; Voelklein was ill at the time, but was kept informed by King of what was going on. These witnesses were severely cross-examined as to their own speculations, and as to certain combinations or syndicates to "protect the market," begun very soon after the company was formed, and continued till it changed its name, or later, to which, as to "pooling," when the market fell in September, 1889, Oats and Weingarten became parties. King, though he sold most of his shares, retained to the end a great many, not less (as appears from the extracts from the share registers) than 4780. Voelklein was a dealer in shares and had a large interest in this company, and admits that he "jobbed, bought, and sold." The particulars of his dealings, and how many shares he retained unsold, do not appear, nor do the particulars of the operations in August or September, 1889, of the "protecting" syndicate or of King—they do not seem to have been asked for. Whatever suspicion these dealings might have justified, if the evidence of those two defendants had stood alone, it does not stand alone, and there is no counter evidence on the main point as to the good faith of the agreement with Oats. Weingarten stands in a more favourable position. He was one of the vendors of Zoetvlei, of the minerals on which he had formed a hopeful opinion. He lived and carried on business in Griquatown, at some distance from Kimberley, and says he had nothing to do with the share market. Of the arrangement with Oats he knew nothing till after it was concluded; he was first informed of it when Oats and Hirsche passed through Griquatown on their way back from Zoetvlei. He approved of it, and was afterwards present at the meeting of the 21st of August when it was confirmed. He was not a director of any other company "besides these syndicates"; he "pooled" some of his shares, and in October, 1889, received from Hirsche, as his quota of the produce of the "pool," £3000. When examined he still held about 5000 shares.

So far as probabilities go, their Lordships cannot say that they are opposed to the statements of the defendants that, in making the agreement with Oats, they acted in good faith, and believed they were doing the best for the company's interest. Their Lordships think that, as things stood on the 8th of August, they might reasonably entertain that belief, and that, if they did so, no dolus malus ought to be imputed to them because they afterwards confirmed and acted upon that agreement, the market for shares having in the meantime risen. The company, beyond question, wanted money; and it does not appear to their Lordships that there was any probability, on the 8th of August, of its being obtained by any attempt to dispose of the reserved shares in any other manner on better terms, or with more prospect of advantage to the undertaking. It is impossible, on the evidence, to say that there was not at that time reasonable ground for believing the asbestos to be valuable. The character and reputed means of Oats might well be thought likely, if he took the shares, to add strength to the company; even the knowledge that such a man was consulted, and had agreed to view the property and report upon it, stipulating for a fortnight's option to take 10,000 shares, might create confidence in and add to the credit of the undertaking (as it would appear by some passages in the evidence to have actually done), though the rapidity with which that effect would be produced may not have been foreseen. On the other hand, if these 10,000 shares had been at that time thrown upon the market by the directors themselves (and whatever was done was sure to be known in the share market of such a place as Kimberley), without anything else being done to strengthen the company's position, the effect might very probably have been to depress instead of raising the market, and no purchasers might have been found for so large a number of shares at 18*s.*, much less above par value. Nor is this a mere speculative opinion: the weight of evidence appears to their Lordships to be in favour of the conclusion that the price of those shares would never have gone up as it did if the agreement with Oats had not been made, though the upward tendency of the general share market at Kimberley, and the operations of some speculators, may have contributed to it, as the defendant King says they did. But King had said just before: "To the best of my memory, when the negotiations with Oats first commenced, the shares of the Griqualand Syndicate were somewhere between 9*s.* 6*d.* and 11*s.* per pound share, fully paid; and from that time till the negotiations were concluded there was a constant improvement in the shares, it having become known that there was a possibility of Oats going out to report." Hirsche says: "As I was seen talking to Oats by brokers and others (the conversation being in the street), the shares rose." And it is proved, by the quotations which are in evidence, that this company's shares were quoted and sold at 14*s.* in the morning and at 18*s.* in the afternoon of the 8th of August. The opinion of Oats himself (who did not believe that "the talk" with him or his "going out" led to or had anything to do with the rise in the shares) is not, in their Lordships' judgment, of equal weight with that of his attorney Hinrichsen, who lived at Kimberley, and was likely to know more of the ways of the market there. Hinrichsen sold the shares which Oats took openly, "every one" (he says) "knew it was Oats' shares; it did not strike me that his selling would create suspicion in the minds of the public." And, as to the cause of the rise: "I have had considerable experience in share dealing in Kimberley. My opinion is, the shares went up on the strength of such a man as Mr. Oats interesting himself in the property and going out to [it], the shares having been neglected for so long. The share market generally at Kimberley about that time was of an improving state."

Their Lordships, upon the whole evidence, are unable to differ from the judgment of the learned President of the High Court of Griqualand as to the absence of any sufficient proof, either of fraud against the company in the agreement with Oats or of resulting damage to the company, beyond the £1000. As to the measure of damage, they do not think that the authorities cited by the respondents, of which *McKay's Case* (1) and *Weston's Case* (2) are typical examples, are applicable to this case, when reduced to one of an agreement made bonâ fide, but partially ultrà vires. Those were cases in which directors, or fiduciary agents of companies, had appropriated to themselves and for their own benefit, by means of secret bargains with promoters or vendors, shares represented as paid up for which no consideration had been given, or other property of which they were trustees for their companies. In all of them the actual or presumable value was treated as a proper subject for evidence; and the principle applicable was (in *McKay's Case* (1)) thus explained by Mellish, L.J.: "I think he is only liable for what was the fair value of the shares when the allotment was made, or at any subsequent time. But McKay is a wrongdoer; and, therefore, in estimating the damages, a presumption may be made against him which could not be made against a person who was not a wrongdoer."

In the present case, unless fraud or bad faith in making the agreement of the 8th of August, 1889, has been brought home to the defendants, they are not wrongdoers, in the sense in which Mellish, L.J., used the word. They speculated, indeed, but only with their own shares, their title to which was unquestionable, and has not been questioned. They made no condition or stipulation with Oats for their own benefit, and had no interest in the 10,000 shares which he took, or any of them. If the agreement itself of the 8th of August was not fraudulent, none

(1) Law Rep. 2 Ch. D. 1.
(2) Law Rep. 10 Ch. D. 579.

of the consequential steps taken upon the footing of it either by Oats or by the directors were so.

If a case of fraud or bad faith had been made out, it might follow that the 23rd of August, when the shares were delivered, and not the day on which the agreement was made, ought to be regarded in the estimation of damages. Even in that case, their Lordships would have been unable to agree with the learned judges who thought that the price quoted for the company's shares in the Kimberley market on the 23rd of August was the necessary or proper measure of damages. The case of premiums fluctuating from day to day in a suddenly inflated local market was not one which, in any of the authorities to which reference has been made, the Courts had to consider: the facts in those cases did not raise the question whether more than par value should be charged. It is, no doubt, true that in the Kimberley market all the 10,000 shares taken by Oats were (at different times) actually sold, as were a large number of other shares in the company, some belonging to the defendants; and some of them (it does not appear whose or how many) were sold at 48*s.* 6*d.* on the 23rd of August. But the inference that 10,000 shares, if brought into the market on that day, would or might have been all sold for that price does not appear to their Lordships to be warranted or reasonable. The profits actually made by the sale of those 10,000 shares (which might have been recovered from Oats if a case of fraud could be made out against him in a suit properly instituted) were only about £7000—less than half the amount claimed by the declaration in this case, and which the Supreme Court of the Cape of Good Hope would have awarded, if no concession had been made by the plaintiffs, and less, by more than £3000, than the £10,875 to which the claim was reduced by their concession, and which has been awarded by the judgment under appeal. Their Lordships express no opinion upon the question whether, if fraud had been proved, the amount of the profits made by Oats would have been a just measure of damages, as against the directors; but they have no difficulty in saying that it would have been much more consonant with their ideas of justice than that adopted by the Supreme Court of the Cape of Good Hope.

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Not thinking fraud proved, and looking upon the confirmation of the agreement of the 8th of August at the board meeting of the 21st, and the subsequent delivery of the shares, as only the performance in good faith of that agreement by the directors after Oats had done the stipulated service to the company in reliance upon it, their Lordships have come to the conclusion that the damages in this case ought not to exceed what would have been the fairly presumable value of the 10,000 shares to the company if the agreement of the 8th of August had never been made. That is the utmost that the company can have lost by the transaction, and they ought not to recover more than they may reasonably be presumed to have lost. A subsequent market price, due wholly, or to an extent which cannot now be distinguished, to the influence upon the market of that transaction itself, cannot be a just or reasonable measure of what might have been realised from the shares if no such agreement had been made; and their Lordships are led by the evidence to conclude that the transaction did, in fact, so influence the market. Under these circumstances, they think that the 8th of August, and not the 23rd, is the date to which they ought to look for the purpose of estimating the loss to the company by the transaction; the shares were not, before that date, quoted at a price equal to that which Oats agreed to give; and there are no materials from which their Lordships can infer that the company would have been able to issue them above par, if there had been no agreement giving Oats the option to take them.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the judgment of the Supreme Court of the Cape of Good Hope, and to restore that of the High Court of Griqualand. The appellants will have the costs of this appeal; but there will be no costs on either side of the appeals to the Supreme Court of the Cape of Good Hope.

Solicitors for appellants: *Ingle, Cooper, & Holmes.*

Solicitors for respondents: *White & De Buriatte.*

[PRIVY COUNCIL.]

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June 29;
July 3, 28.

SIRDAR GURDYAL SINGH . . . . . DEFENDANT;

AND

THE RAJAH OF FARIDKOTE . . . . PLAINTIFF.

TWO APPEALS CONSOLIDATED.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAUB.

Jurisdiction of Foreign Court—Decrees of Foreign Court against absent Foreigners—Personal Actions.

No territorial legislation can give jurisdiction which any foreign Courts ought to recognise against absent foreigners who owe no allegiance or obedience to the Power which so legislates.

In all personal actions the Courts of the country in which the defendant resides, not the Courts of the country where the cause of action arose, should be resorted to.

Where a Faridkote Court passed ex parte money decrees against the defendant, who had been treasurer of Faridkote, but at the date of suit had ceased to be such, and was resident in Jhind, of which State he was a domiciled subject:—

Held, that such decrees were a nullity by international law.

Becquet v. *Macarthy* (1) distinguished.

Schibsby v. *Westenholz* (2) explained.

CONSOLIDATED APPEALS from two decrees of the Chief Court of the Punjaub (July 24, 1888), reversing in second appeal the decrees of the Commissioner of Lahore (August 29, 1882), which affirmed decrees of the Assistant Commissioner (Feb. 24, 1882), and dismissed the respondent's suits which were brought on the 12th of November, 1881.

The questions as to which the Courts below differed were matters of law, and related firstly, to the competence of the jurisdiction of the native Court of Faridkote under the special circumstances of these suits or at all to make binding ex parte decrees against the defendant; and secondly, as to the competence of the British Indian Courts to recognise and give effect to those decrees.

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* *Present*:—THE EARL OF SELBORNE, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and SIR RICHARD COUCH.

(1) 2 B. & Ad. 951.

(2) Law Rep. 6 Q. B. 161.

The respondent is Rajah and ruler of Faridkote, in the Punjaub, described by the senior judge of the Chief Court as a "protected dependent State," but "not incorporated with and not forming an integral part of the British Dominions," the chief of which has, under the engagements entered into with him by the British Government after the conquest of the Punjaub, the right of legislating for the internal affairs of his own State and constituting Courts of Justice, rights which that State had before possessed, and which were recognised and continued to it by those engagements, which are to be found in Aitcheson's Treaties, Engagements, and Sunnuds (ed. 1876, vol. vi. p. 59), and in the 2nd volume of the earlier edition, pp. 61, 437.

The senior judge, observing on those engagements, says as to the sunnud of the 21st of April, 1863 :—

"The first article 'confirms and guarantees to the Rajah' all the powers and authority, civil, criminal and fiscal, at present exercised by the Rajah. There is no limitation expressed in the other articles, and certainly not in the 5th clause relied on by defendant that the Rajah and his successors will exert themselves to execute justice and promote the happiness and welfare of their people."

"The first article appears to include legislative authority in civil matters, including the jurisdiction of State tribunals. Presumably such authority is vested either in the Rajah, as ruler of the State, or in the British Government, and it must necessarily have been frequently exercised in the past twenty years. No attempt has been made to shew that it has been exercised by the British Government, whereas there is evidence that it has been exercised by the Rajah."

Mr. Aitcheson, in his note on the sunnud of the 21st of April, 1863, observes :—

"This sunnud is in some respects similar to those granted in 1860 to the Maharaja of Puttiala and the Rajahs of Jhind and Nabha. But it differs from them in this most important respect, that it conferred no new rights or privileges on the Rajah, but merely guaranteed and confirmed to him those which he then enjoyed."

There was no difference of opinion in the Courts below as to the extent of the Rajah's powers, and the undisputed evidence shewed that in the exercise of those powers the Rajah had of his own authority adopted the Indian Codes of Civil Procedure, so far as they were applicable, i.e., Act VIII. of 1859, and Act X. of 1877, of which the latter was in force in British India at and before the institution of these suits, and had appointed judges of varying jurisdictions to try causes, of whom prior to the commencement of the litigation between these parties in the Faridkote Courts one Gunga Pershad was the Chief Judge, having jurisdiction to try suits of any value, and one Ganhar Singh had, until the special authority given to him to try the present suits against the respondent, a jurisdiction limited to suits of the value of Rs.1000.

Bir Singh, the father of the appellant, was a native of Jhind, another of the protected dependent States of the Punjaub, and a servant of the respondent's father. According to the Commissioner of Lahore he "not only contracted with the Rajah to keep his accounts or otherwise to act for him as bakshi or treasurer, but resided in the State for two or three years more in the capacity of bakshi." Two subordinate officers were employed under him in the Treasury. Considerable defalcations in the moneys under his charge were alleged. Bir Singh left his employment, and after some correspondence in 1877 plaints in two suits were filed in the Faridkote Civil Court presided over by Ganhar Singh, acting in pursuance of the Rajah's authority. The first was brought against Bir Singh and his two subordinates, claiming Rs.61,664 in respect of the alleged defalcations in the Treasury; the second against Bir Singh alone, to recover Rs.18,324 as due for principal and interest in respect of certain moneys received by him from the State on his own account, and also for Rs.10,000, the price of some property at Lahore. Summonses were served on Bir Singh.

Ganhar Singh, on the 8th of November, 1879, gave judgment in the first suit against the three defendants jointly for Rs.60,341; and on the 25th of January, 1880, a decree in the second suit against Bir Singh alone for Rs.16,133. The latter had no assets in Faridkote, and execution of the decrees in Jhind was considered difficult to obtain. But having engaged in trading transactions in Lahore, he came under the jurisdiction of the Lahore Court, and thereupon the suits in which these appeals arose were instituted.

The material issues settled were—

I. Has the Court jurisdiction,

(*b.*) By reason of the plaintiff being a recognised foreign State or the object of the suit being to enforce the private rights of the plaintiff within the meaning of sect. 431 Civil Procedure Code. (Onus on plaintiff).

II. Had the Faridkote Court which tried the suit jurisdiction,

(*a.*) Over the person of the defendant?

(*b.*) The subject-matter of the suit?

(*c.*) By reason of the judge's pecuniary powers, and can this objection (*c*) be pleaded in the present suit? (Onus on defendant).

The assistant commissioner held that Faridkote was admittedly "a recognised foreign State," and that its established and recognised Courts were foreign Courts; and that the Lahore Court had jurisdiction in a suit instituted by the Rajah of Faridkote to recover moneys made away or misapplied by his servant, whether the plaintiff sued personally or as a ruler of a State.

He further held, that as Bir Singh was a subject of the State of Jhind, and was never domiciled in Faridkote, and had left that State without any intention of returning some time before the suits were instituted against him in the Faridkote Court, "it was clear the latter Court would have had no jurisdiction over his person," unless he had submitted himself to the jurisdiction, and the assistant commissioner expressed his opinion that there was no authority for such a proposition, and referred to several cases, and in particular to the judgment of Blackburn, J., in the case of *Schibsby* v. *Westenholz* (1), where that learned Judge threw out, without deciding the point,

(1) Law Rep. 6 Q. B. 155.

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that a defendant would be bound by the laws of the country in which he contracted. And the assistant commissioner, after expressing an opinion that these present suits were based not on contract, but tort, went on to say that even if such a doctrine could be maintained in a more highly civilised State, it would not be applicable in a protected native State with no known settled laws and judicial system.

And he concluded his judgment on that point in these words:—

"Thus it seems clear that, judged by the general law governing the subject of foreign judgments, and treating Faridkote as a foreign country like France and Germany, the present judgments must fail on the ground of want of jurisdiction on the part of the Faridkote Court over the person of the defendant, and no submission to jurisdiction is made out."

The commissioner affirmed this judgment on a ground not referred to by the First Court. He held that it was open to question whether the English common law had any application in India, and that it had been decided in *Bhavanishankar Shevakram* v. *Pursadri Kalidas* (1) that the Courts of British India had no jurisdiction to entertain a suit on a judgment of a native Indian Court, the judgment in question in that case being one of a Court of His Highness the Guikwar of Baroda; that the judgments of any native State do not give rise to any obligation in a British Court, except as provided by sect. 134 of the Code of Civil Procedure.

The Chief Court (Bir Singh having died) reversed these decrees, and gave the respondent decrees for the amounts claimed by him in each case with costs in all Courts.

The judges held—

(*a.*) On the question as to the status of Faridkote that it had all such attributes of independent States as were compatible with its condition of protection and dependence, and which might be consistent with any compact subsisting between it and the protecting power, and with the established course of dealing between them, and that it should in the Courts of Law be treated on the footing of an independent State.

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(1) Ind. L. R. 6 Bomb. 292.

(*b.*) That the right of jurisdiction was a right incidental to such independence, and that the ruler of such a State had the power to prescribe rules of civil jurisdiction, including rules empowering the Courts of the State to hear and decide causes against non-resident aliens when the obligation sought to be enforced was contracted by such aliens while resident in the State.

(*c.*) That the question whether the Faridkote Court was a Court of competent jurisdiction depended in part upon the question whether, according to the maxims of the Courts of British India, a rule made granting jurisdiction over a non-resident alien in respect of a cause of action arising within the territory ought to be recognised as a valid rule.

(*d.*) That such a rule had been in fact prescribed by the Faridkote State which had been shewn to have adopted the Indian Civil Procedure Code, which in sect. 4 of Act VIII. of 1859 had expressly declared that no person was to be exempted from the jurisdiction of any Civil Court by reason of his place of birth, or by reason of descent; and in sect. 5 gave jurisdiction to the Courts within the limit of whose jurisdiction the cause of controversy had arisen, provisions which are also to be found in Act X. of 1877.

(*e.*) That the Faridkote Court was a foreign Court within the meaning of sect. 2 of Act X. of 1877.

(*f.*) That Faridkote was a foreign State within the meaning of sect. 431 of Act X. of 1877, and that the said suits in the Lahore Court were suits to enforce the private rights of the head of the Faridkote State, and as such were maintainable under Clause B of the said section.

(*g.*) That a judgment of a Court of a native State in India might constitute a cause of action in a British Indian Court.

(*h.*) That to a suit brought upon such a judgment, want of jurisdiction in the Court that pronounced the judgment sued upon might be pleaded, that it had not been proved in this case that the Faridkote Court was not a Court of competent jurisdiction, but that in their opinion, according to the laws of the Faridkote State, the Faridkote Court had jurisdiction over the

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said Bir Singh and over the subject-matter of the said suits, and further that the authority of the said Ganhar Singh had not come to an end when the said judgments were pronounced.

(*i.*) That according to the laws of British India, the Faridkote Court was a Court competent to try the said case and to pronounce judgment therein, though the said Bir Singh was not a subject of or resident in the said State when the suits were instituted against him, because the obligations in respect of which the said judgments were pronounced were contracted by the said Bir Singh during his residence in the said State, and were intended to be there fulfilled.

(*j.*) That though it would be a good defence to such a suit, that the defendant had no opportunity of defending himself in the foreign Court, and no notice to give him such opportunity, yet that in this case the said Bir Singh had such notice but did not avail himself of it; and in a later part of their judgment the learned judges held that the question of whether the said Bir Singh had received notice in time to enable him to defend the said suits was a question of fact which had been decided against him in the lower Courts, and which he could not therefore raise on second appeal.

(*k.*) That it could not be pleaded to an action on such a judgment that the judgment was erroneous upon the merits of the questions it decided.

The learned judges then reserved for further consideration the question whether the said judgments had been obtained by fraud, and came to the conclusion that they had not been so obtained.

The material passages in the judgment of the chief judge in reference to the point decided by their Lordships is as follows:—

"The broad question is whether the First Court rightly decided on the facts found that the Faridkote Court was not a Court of competent jurisdiction to pronounce the judgment sued upon?

"The material facts are as follows:—

"The defendant was not a subject of the Faridkote State: he resided there for some years as an officer in the service of the State, but had quitted the State some years before the com-

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mencement of the suit in the Faridkote Court, and had not returned, and did not intend to return, to the State.

"His service in the State involved the receipt and custody of moneys of the State, to be accounted for by him to the State, and the original action brought against him was brought to recover moneys alleged not to have been duly accounted for, and to have been misappropriated by him in the State during his service. The judgment found that he was indebted to the plaintiff for a specified amount, and upon that judgment this suit is brought.

"Assuming for the present that the judge had proper authority according to the laws of the State to hear and decide the suit, and that the defendant had due notice of the proceedings, I think it must be held that the Faridkote Court was a Court of competent jurisdiction.

"It appears to be an open question under the English law, whether, under the circumstances stated, a foreign Court would have jurisdiction. In *Schibsby* v. *Westenholz* (1) Blackburn, J., said: 'If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them, though before finally deciding this we should like to hear the question argued.'

"There is certainly, so far as I can ascertain, no rule of international jurisprudence universally recognised that a municipal Court is absolutely incompetent to exercise jurisdiction over a non-resident foreigner, and it is certain that in many, if not in most countries, the municipal law authorises the exercise of jurisprudence in such cases by its own Courts, subject, generally speaking, to the condition that notice, actual or constructive, be given to the absent defendant. For instance, by a recent change in the English law, as contained in rule 1 and 1A of Order XI., under the English Judicature Acts, a summons may be issued for service without the jurisdiction in the cases specified. Again, the Code of Civil Procedure expressly enacts in sect. 10, that no person shall, by reason of his descent or place of birth, be in any civil proceedings exempt from the jurisdiction of any

(1) Law Rep. 6 Q. B. 161.

of the Courts, and in sect. 89 provides for service of summons outside the jurisdiction, while sect. 17 authorises the Court to take cognizance of certain suits when the cause of action has arisen within the jurisdiction.

"Again, it is certain that, according to the English doctrine, a non-resident foreigner may in a variety of ways submit himself to the jurisdiction of the Courts of a country, by the laws of which he is not otherwise bound, so as to be bound by the judgment of such Court, when sought to be enforced against him in his own country.

"Further, it is certain that whenever a question arises of enforcing the obligations arising out of a contract, the law to be applied is the lex loci contractûs, and this furnishes a strong argument in favour of the binding effect of the judgment of a tribunal loci contractûs over an absent foreigner who had contracted while resident in the country where such tribunal is situate.

"On the other side are the rules laid down by Savigny as to the forum contractûs, or rei gestæ (or the forum speciale obligationis), resort to which is subject to the condition that the defendant is either personally present there, or possesses property there. But on this Mr. Westlake remarks that 'this qualification appears to be a condition narrowing the principle on which the rules are founded.'

"A distinction is suggested in the judgment of the district Court as to the action being in contract or in tort. I do not think this is material. The case in the Faridkote Court was one of enforcing an obligation arising out of a contract made and to be fulfilled in the Faridkote State, namely, to account truly for moneys received; and it seems immaterial whether the breach by way of non-fulfilment amounted to a wrong or not. But the case of wrongs affords an argument in favour of the jurisdiction claimed; for, by universal practice, jurisdiction of a State is admitted over all wrongs committed within the territory, whether by subjects or foreigners. (Westlake, 108, 118, and 119).

"On the whole, I think it may be said that a State assuming to exercise jurisdiction over an absent foreigner in respect of an obligation, arising out of a contract made by the foreigner while resident in the State, and to be fulfilled there, is not acting in contravention of the general practice or the principles of international law, so that its judgment should not be binding merely on the ground of the absence of the defendant."

Jelf, Q.C., and *Branson*, for the appellant, contended that the foreign judgments sued on were not, under the special circumstances of the case, judgments on which the Lahore Court was justified in passing decrees. These circumstances included the fact that the only summonses proved to have been served by the Faridkote Court were served after the date fixed in the summons for the hearing of the cases had passed. The Faridkote Court was one from which an appeal lay to the Rajah himself, who was plaintiff in the suits. The judge, moreover, was a nominee of the plaintiff; and it was contended that his power to act as judge had expired; and that the cases were decided in the absence of any sufficient evidence being adduced. Under these circumstances, even assuming the jurisdiction of the Faridkote Court, these are judgments into which a British Court will inquire, and which it will not treat as binding: see *The Charkieh* (1). But the Faridkote Court had no jurisdiction on any recognised principle of international law against the appellant, who had left the territory, and was no longer either actually or constructively a resident therein, but was a domiciled subject of the State of Jhind: see *Godard* v. *Gray* (2); *Schibsby* v. *Westenholz* (3); a judgment of Holloway, J., in *Mathappa Chetti* v. *Chellappa Chetti* (4); and Westlake's Private International Law (ed. 1890), p. 206; Foote's Private International Jurisprudence (2nd ed.), p. 560. Reference was also made to the *Duchess of Kingston's Case* (5); *Price* v. *Dewhurst* (6).

It lies on the respondent to establish that the Court which gave him his decree had jurisdiction—that is, was legally entitled to exercise coercive power over the defendant, and that it did exercise it in such a way as that a foreign Court may without violating natural justice give effect to it and to the decrees which it passed: see *Bank of Australasia* v. *Nias* (1); *Ferguson* v. *Mahon* (2); *Rousillon* v. *Rousillon* (3); *Ashbury* v. *Ellis* (4). If the Court had no jurisdiction, the decrees were an absolute nullity; if it had jurisdiction, and passed them against a man who had no notice of the proceedings till after they had terminated in decrees, they must be treated as nullities by all foreign Courts.

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(1) Law Rep. 4 A. & E. 59.
(2) Law Rep. 6 Q. B. 139.
(3) Law Rep. 6 Q. B. 155.
(4) Ind. L. R. 1 Madras, 199.
(5) 2 Sm. L. C. 871.
(6) 8 Sim. 279.

Finlay, Q.C., *Doyne*, and *Rattigan*, for the respondent, contended that the point as to the claim being contrary to natural justice was new, and that any question of fraud in obtaining the Faridkote judgments had been given up in the Courts below. With regard to service of notice or summons, it was rightly held that the appellant had had full notice of the suits, and had advisedly declined to appear. He, at all events, had an opportunity of appearing, and might have chosen to avail himself of it: see *Vadala* v. *Lawes* (5), following *Abouloff* v. *Oppenheimer & Co.* (6). With regard to the jurisdiction of the Faridkote Court, it was contended that it clearly had jurisdiction over the appellant as to the matters in suit while he remained in the territory of Faridkote, and that it retained that jurisdiction after he had withdrawn himself from that territory. It is not merely that the cause of action arose in Faridkote, but the larger suit is entirely occupied with this, that he did not account, having been treasurer. By becoming State treasurer the appellant submitted himself to the jurisdiction of the Faridkote Court, for where a man takes office in a State he must be deemed to have agreed to be bound by the jurisdiction of that State as accounting for money due from him to that State in respect of that office. In any case, where an office is accepted in that way, and the whole cause of action arises in that State, there is jurisdiction which is obligatory on the acceptor. The law of procedure in Faridkote was that embodied in Act VIII. of 1859, which had been adopted in Faridkote: see sect. 5. Reference was made to Phillimore's International Law (ed. 1889), vol. iv. p. 758. In

(1) 16 Q. B. 717.
(2) 11 Ad. & E. 179.
(3) 14 Ch. D. 351, 371.
(4) [1893] A. C. 341.
(5) 25 Q. B. D. 310.
(6) 10 Q. B. D. 295.

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British India the Court whose judgment should be enforced is the Court in the ambit of whose jurisdiction the cause of action arose. The sections in the Code are intended to regulate the distribution of business amongst the Courts. The English legal rule is that wherever there is a contract to be performed within the jurisdiction of any Court, there may be service of summons outside the jurisdiction: see the first order under the Judicature Acts. The Roman Law, however, is to be referred to as the source of the rules applicable to this case. The maxim is, "Actor sequitur forum rei." That brings in, no doubt, the domicil of the reus; but, subject to this, that where the obligation is to be performed, there is the place of jurisdiction: see Digest, bk. v. tit. 1, s. 19, "Si quis tutelam vel curam vel negotia vel argentariam vel quid aliud, unde obligatio oritur, certo loci administravit; etsi ibi domicilium non habuit, ibi se debebit defendore et si non defendat neque ibi domicilium habeat, bona possideri patietur." Seizing goods was the means of compelling appearance; but the jurisdiction arose when a contract was made and broken by the defendant within its local ambit. See also *Mathappa Chetti* v. *Chellappa Chetti* (1), where the above passage of the Digest is cited. There the contract was made, was to be performed, and was broken in the jurisdiction. [LORD WATSON:—That applied to a man who was personally subject to the jurisdiction.] See Digest, bk. 42, tit. 5, s. 2, and a passage from Savigny, quoted by Westlake in his International Law, pp. 205, 208. Reference was made to *Hewitson* v. *Fabre* (2); *Becquet* v. *Macarthy* (3); to *Don* v. *Lippman* (4), to an observation (p. 21) of Lord Brougham, in reference to an action brought in the Mauritius after the defendant had gone to the Cape of Good Hope. [EARL OF SELBORNE:—There the defendant was actually holding office at the time in the Mauritius; here the defendant had ceased to be treasurer of Faridkote.] *Williams* v. *Jones* (5), cited by Blackburn, J., in *Schibsby* v. *Westenholz* (6); *Godard* v. *Gray* (7). Here the defendant had held office, was connected by circumstances with the State, and had assets therein, pay being still due to him: *Rousillon* v. *Rousillon* (1); *Kaliyugam Chetti* v. *Chokalinga Pillai* (2); *Sama Rayar* v. *Annamalai Chetti* (3).

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(1) Ind. L. R. 1 Madras, 199.
(2) 21 Q. B. D. 6.
(3) 2 B. & Ad. 951.
(4) 5 Cl. & F. 1.
(5) 9 M. & W. 819.
(6) Law Rep. 6 Q. B. 155.
(7) Law Rep. 6 Q. B. 137.

Counsel for the appellant were not heard in reply.

1894. July 28. The judgment of their Lordships was delivered by the

EARL OF SELBORNE:—

The respondent, the Rajah of Faridkote, obtained in the Civil Court of that native State, in 1879 and 1880, two ex parte judgments, in two suits instituted by him against the appellant, for sums amounting together to Rs.76,474 11*a.* 3*p.*, and costs. For all the purposes of the question to be now decided, those two suits may be treated as one; the appeals to Her Majesty in Council having been consolidated. Two actions, founded on these judgments, were brought by the Rajah against the appellant in the Court of the Assistant Commissioner of Lahore and were dismissed by that Court, on the ground that the judgments were pronounced by the Faridkote Court, without jurisdiction as against the appellant. On appeal to the Additional Commissioner of Lahore, the judgments of the first Court were upheld. The Rajah then appealed to the Chief Court of the Punjaub, which differed from both those tribunals, and upheld the jurisdiction of the Faridkote Court.

Faridkote is a native State, the Rajah of which has been recognised by Her Majesty as having an independent civil, criminal, and fiscal jurisdiction. The judgments of its Courts are, and ought to be, regarded in Her Majesty's Courts of British India as foreign judgments. The Additional Commissioner of Lahore thought that no action could be brought in Her Majesty's Courts upon a judgment of a native State; but in this opinion their Lordships do not concur.

The appellant was for five years, beginning in 1869, in the service of the late Rajah of Faridkote as his treasurer; and the causes of action, on which the suits in the Faridkote Court were brought, arose within that State, and out of that employment of the appellant by the late Rajah. The claim made in each of the suits was merely personal, for money alleged to be due, or recoverable in the nature of damages, from the appellant. It is immaterial, in their Lordships' view, to the question of jurisdiction (which is the only question to be now decided) whether the case, as stated, ought to be regarded as one of contract or of tort.

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(1) 14 Ch. D. 351.
(2) Ind. L. R. 7 Madras, 105.
(3) Ind. L. R. 7 Madras, 164.

The appellant left the late Rajah's service, and ceased to reside within his territorial jurisdiction, in 1874. He was from that time generally resident in another independent native State, that of Jhind, of which he was a native subject and in which he was domiciled; and he never returned to Faridkote after he left it in 1874. He was in Jhind when he was served with certain processes of the Faridkote Court, as to which it is unnecessary for their Lordships to determine what the effect would have been if there had been jurisdiction. He disregarded them, and never appeared in either of the suits instituted by the Rajah, or otherwise submitted himself to that jurisdiction. He was under no obligation to do so, by reason of the notice of the suits which he thus received or otherwise, unless that Court had lawful jurisdiction over him.

Under these circumstances there was, in their Lordships' opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of suit ("Actor sequitur forum rei"); which is rightly stated by Sir Robert Phillimore (International Law, vol. 4, s. 891) to "lie at the root of all international, and of most domestic, jurisprudence on this matter." All jurisdiction is properly territorial, and "extra territorium jus dicenti, impune non paretur." Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of status or succession governed by domicil, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (e.g., under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to the Power which so legislates.

In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced.

These are doctrines laid down by all the leading authorities on international law; among others, by Story (Conflict of Laws, 2nd ed., ss. 546, 549, 553, 554, 556, 586), and by Chancellor Kent (Commentaries, vol. 1, p. 284, note *c*, 10th ed.), and no exception is made to them, in favour of the exercise of jurisdiction against a defendant not otherwise subject to it, by the Courts of the country in which the cause of action arose, or (in cases of contract) by the Courts of the locus solutionis. In those cases, as well as all others, when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice.

The conclusion of the learned judges in the Chief Court of the Punjaub is expressed in the following sentence of the judgment delivered by Sir Meredyth Plowden in the first of the two actions:—

"On the whole, I think it may be said, that a State assuming to exercise jurisdiction over an absent foreigner, in respect of an obligation arising out of a contract made by the foreigner while resident in the State and to be fulfilled there, is not acting in contravention of the general practice or the principles of international law, so that its judgment should not be binding merely on the ground of the absence of the defendant."

If this doctrine were accepted, its operation, in the enlargement of territorial jurisdiction, would be very important. No authority, of any relevancy, was cited at their Lordships' Bar to support it, except *Becquet* v. *Macarthy* (1), and a passage from the judgment delivered by Blackburn, J., in *Schibsby* v. *Westenholz* (2). Of *Becquet* v. *Macarthy* (1), it was said by great authority in *Don* v. *Lippman* (3), that it "had been supposed to go to the verge of the law"; and it was explained (as their Lordships think, correctly) on the ground that "the defendant held a public office in the very colony in which he was originally sued." He still held that office at the time when he was sued; the cause of action arose out of, or was connected with it; and, though he was in fact temporarily absent, he might, as the holder of such an office, be regarded as constructively present in the place where his duties required his presence, and therefore amenable to the colonial jurisdiction. If the case could not be distinguished on that ground from that of any absent foreigner who, at some previous time, might have been in the employment of a colonial government, it would, in their Lordships' opinion, have been wrongly decided; and it is evident that Fry, L.J., in *Rousillon* v. *Rousillon* (4), took that view.

The words of Blackburn, J.'s, judgment, in *Schibsby* v. *Westenholz* (5), which were relied upon, are these :—

"If, at the time when the obligation was contracted, the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though, before finally deciding this, we should like to hear the question argued."

Upon this sentence it is to be observed, that beyond doubt in such a case the laws of the country in which an obligation was contracted might bind the parties, so far as the interpretation and effect of the obligation was concerned, in whatever forum the remedy might be sought. The learned judge had not to consider whether it was a legitimate consequence from this, that they would be bound to submit, on the footing of contract or

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(1) 2 B. & Ad. 951.
(2) Law Rep. 6 Q. B. 155.
(3) 5 Cl. & F. 1.
(4) 14 Ch. D. 351.
(5) Law Rep. 6 Q. B. 161.

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otherwise, to any assumption of jurisdiction over them in respect of such a contract, by the tribunals of the country in which the contract was made, at any subsequent time, although they might be foreigners resident abroad. That question was not argued, and did not arise, in the case then before the Court; and, if this was what Blackburn, J., meant, their Lordships could not regard any mere inclination of opinion, on a question of such large and general importance, on which the judges themselves would have desired to hear argument if it had required decision, as entitled to the same weight which might be due to a considered judgment of the same authority. Upon the question itself, which was determined in *Schibsby* v. *Westenholz* (1), Blackburn, J., had at the trial formed a different opinion from that at which he ultimately arrived; and their Lordships do not doubt that, if he had heard argument upon the question, whether an obligation to accept the forum loci contractûs, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their Lordships do) to the conclusion, that such obligation, unless expressed, could not be implied.

Their Lordships will therefore humbly advise Her Majesty to reverse the decrees of the Chief Court of the Punjaub, and to restore those of the Additional Commissioner of Lahore. The respondent will pay the costs of the appeals to the Courts below and of these appeals.

Solicitors for the appellant: *Payne & Lattey.*
Solicitors for the respondent: *T. L. Wilson & Co.*

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(1) Law Rep. 6 Q. B. 161.

[HOUSE OF LORDS.]

ROSE AND OTHERS . . . . APPELLANTS; H. L. (E.)

AND 1894

THE BANK OF AUSTRALASIA . . . RESPONDENTS. March 20.

Ship—Cargo—Freight—General Average—Cargo in Peril—Expenses of Landing and Transporting Cargo to Place of Safety—Extraordinary Expenditure for General Benefit—Remuneration to Shipowner's Agent—Sale of Unidentified Cargo—Commission.

Where after a disaster at sea the shipowner, not merely with a view to freight but in the interests of the whole adventure or of the cargo-owners, and before he has elected to abandon his ship and carry on the cargo in another ship, incurs necessary expenses in landing and preserving a perishable cargo and carrying it to a place of safety, the expenses ought not to be charged to freight alone, but are either a general average charge, or a charge against cargo, or against cargo and freight, as the case may be.

Where such a disaster happens, there is no rigid rule of law that the shipowner may not employ experienced persons to act in his place for the benefit of all concerned. Whether he is entitled to do so, and to make this extraordinary expenditure a general average charge, must depend on the circumstances of the case, and upon whether he acts reasonably and properly.

So as to the right to charge against the cargo-owners a commission to a commission merchant for arranging the sale of unidentified bales of cargo.

Schuster v. *Fletcher* (3 Q. B. D. 418) disapproved.

APPEAL from an order of the Court of Appeal (1). The following statement of the facts is taken from the judgment of Lord Herschell, L.C. :—

On the 29th of January 1889 a vessel called the *Sir Walter Raleigh*, laden with a valuable cargo of wool, took the ground near Audresselles on the coast of France. As soon as the appellants, the owners of the vessel, heard of the disaster they communicated with a firm carrying on business in the City of London, Messrs. Anderson Anderson & Co., who they knew had had experience in salvage operations, and in dealing with disasters of this description. Accordingly they instructed Messrs. Anderson Anderson & Co. to take the necessary steps in their interest and in the interest of the others concerned in the adventure. Messrs. Anderson Anderson & Co. proceeded at once to do what they could to save both the ship and cargo. They sent Mr. Gavin Anderson, who, though of the same name, was not a member of their firm, to the site of the disaster, and they also made an arrangement with a local firm, Messrs. Adam & Co., bankers, of Boulogne, to do the best they could to save the cargo. In the result it was arranged that Messrs. Anderson Anderson & Co. should receive £750 for their services. One half of this sum, by arrangement between them and Mr. Gavin Anderson, was to be his, the other half was to be theirs. An arrangement was entered into with the firm of Adam & Co., of Boulogne, that they should receive a percentage upon the cargo salved, and this percentage proved to amount to a sum of £1200.

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(1) Not reported.

The cargo was all saved, but considerable portions of the wool were in a damaged condition. The cargo was taken from the ship, carried up to the top of the cliff, and there placed for a time until it was conveyed by carts to Boulogne. A good deal of it was wetted by sea-water and had to be attended to to prevent the deterioration and the destruction of the wetted cargo, and the cargo which had been in contact with it. The cargo was taken in carts from Audresselles, where it had been stored merely in an open field, to Boulogne, where it was placed upon the quay. Steps were there taken to spread it out and protect it from deterioration and destruction, and ultimately (the *Sir Walter Raleigh* having been abandoned) the cargo was re-shipped and forwarded from Boulogne to its destination in London.

On the 8th of February a general average bond was entered into by the respondents, who were owners of a portion of the cargo, by which they agreed to pay their "proper and respective proportion of all general or particular average, salvage, or special or other charges which may be found to be chargeable upon their respective consignments, or to which the shippers or owners of consignments may be liable to contribute in respect thereof." The matter was put into the hands of an eminent firm of underwriters to make out the average statement, and they made out a statement allotting, as they thought right, to the various interests, the expenses that had been paid or incurred. The result of that average statement was to shew a sum due from the present respondents, as owners of a portion of the cargo, to the appellants, the shipowners.

A dispute having arisen as to whether certain items had been taken into account which ought not to have been taken into account, an action was brought by the present appellants to recover the sum which appeared to be due to them according to the average statement. The action was tried before Lawrance J. without a jury; that learned judge treated two questions as the only questions in dispute before him: the one related to the payment of £750 to Messrs. Anderson Anderson & Co. which, it was contended, ought not—or at all events the greater part of it ought not—to be charged; the other related to a sum of 2½ per cent. commission to the same firm in respect of the sale of wool which, owing to the destruction of marks and other causes, could not be identified as belonging to particular consignees. These questions Lawrance J. decided in favour of the appellants, and he gave judgment for them for the amount claimed.

When his judgment was concluded Gorell Barnes J., then counsel for the respondents, said that the learned judge had not dealt with the payment of £1200 to Messrs. Adam, and that it was contended that that was an excessive and unreasonable payment, and also that it had not been properly distributed by the average adjuster. Lawrance J. said that if called upon he was prepared to decide, as he thought he was bound to do on the evidence before him, that the payment was a reasonable one. In the Court of Appeal, that Court (Lord Esher M.R., Fry and Lopes L.JJ.) made an order declaring "that only so much of the £1200 paid to Messrs. Adam as is due in respect of work done up to the end of the 1st day of February 1889, and superintending the extra work done in saving the goods from deterioration at the top of the cliff up to the same date, should be allowed as general average and only to the extent of a reasonable remuneration to Messrs. Adam. That only so much of the sum of £375 paid to Mr. Gavin Anderson should be brought into general average account as represents the fair and reasonable remuneration of Mr. Gavin Anderson at the end of

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the 1st day of February 1889. That no part of the further sum of £375 retained by Messrs. Anderson should be charged as general average in any way against the cargo. That no part of the 2½ per cent. commission charged for the sale of the unidentified portions of the cargo should be brought into general average account or charged against the defendants." The order also dealt with matters not now in dispute.

Feb. 27; March 1, 2. *Cohen* Q.C. and *Scrutton* (*A. E. Barker* with them) for the appellants:—

The expenditure in carting the cargo to Boulogne raises a question not hitherto decided. If it had not been sent there the wool would have been lost or spoiled. The Court of Appeal held that after the removal of the cargo to the beach and subsequently to the field, the whole loss fell on freight. The true view is that the ship, cargo and freight were exposed to a common peril, and the costs incurred should be apportioned between the three interests thus imperilled. If the goods had been warehoused the whole expense would not have fallen on freight, and the expense of carting them to Boulogne rests on the same principle.

[Lord Herschell L.C. referred to *Notara* v. *Henderson* (1).]

The Court of Appeal were entirely mistaken in their view that the shipowners had abandoned the ship on the 1st of February and that all expenses after that date were attributable to freight alone. Those expenses were in fact incurred for the general benefit, or for the benefit of the cargo, or of the cargo and freight; whichever of these alternatives be taken the decision of the Court of Appeal fails: see *Birkley* v. *Presgrave* (2); *Svendsen* v. *Wallace* (3).

[Lord Halsbury referred to *Mordy* v. *Jones* (4).]

Moreover before the 1st of February continuous operations were begun and arrangements made to benefit ship, cargo and freight under contracts made before the 1st of February, and these operations were carried out, and this would justify the charges to general average even if the shipowner had elected

(1) Law Rep. 7 Q. B. 225.
(2) 1 East, 220.
(3) 10 App. Cas. 404.
(4) 4 B. & C. 394.

on the 1st of February to abandon his ship, and carry the cargo in another.

As to the remuneration to Anderson & Co. there is no rule of law forbidding a shipowner to employ and pay an agent to do the best for all concerned on the spot. It must depend on the particular circumstances of the case. *Schuster* v. *Fletcher* (1) is supposed to have so determined, but the case was a different one. If it laid down any such principle, it should be overruled as contrary to good sense. So with regard to the commission on the sale of unidentified bales.

Joseph Walton Q.C. and *John A. Hamilton* for the respondents:—

The decision of the Court of Appeal is in accordance with the practice of average staters. The expenditure in carting the cargo was really incurred for the benefit of the shipowner alone, and in order to enable him to earn his freight. No expenditure could be charged to general average or in any way against the cargo after the period at the latest when the cargo was placed in safety at the top of the cliff at Audresselles.

The services rendered by Anderson Anderson & Co. and by Gavin Anderson ought to have been rendered by the shipowners as part of their ordinary duties, and cannot be charged in general average or against cargo. If the shipowners had acted themselves they could not have made a general average charge for their services, and they cannot be in a better position by employing agents. So with regard to the commission on the sale of unidentified bales. These questions are disposed of by *Schuster* v. *Fletcher* (1).

Cohen Q.C. in reply.

The House took time for consideration.

March 20. Lord Herschell L.C. (after stating the facts given above):—

My Lords, the foundation of the order of the Court of Appeal was that there could be no general average charges in respect of anything done after the 1st of February, and that therefore, whether the expenses incurred after that date related to the actual dealing with the cargo or were charges for the superintendence of the salvage operations, it was equally improper to make any general average charge in respect of them. In the Court of Appeal the learned judges took the view that by the 1st of February the conclusion had been arrived at that it was impossible to save the ship, and that therefore no expenditure after that date was incurred for the general good of the ship and cargo, but only either for the benefit of the cargo or for the benefit of the freight. It is stated in one of the judgments that it appeared to be admitted that such was the case.

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(1) 3 Q. B. D. 418.

My Lords, as far as one can discover, that was a misapprehension on the part of the learned judges. The learned counsel who appeared at the Bar for the respondents conceded, when the case was argued here, that it was impossible for them to maintain that position; and indeed, when the correspondence and the evidence are looked at, it is obvious that they were right in making that concession. It is quite true that on the 1st of February, bad weather having set in, the tugs were sent away, but the letter which refers to the sending away of the tugs says that if the weather improved the tugs could be recalled; and much later than that, as late as the 14th of February, there is a letter which distinctly shews that the hope of saving the ship had not even then been abandoned, and it was certainly not till a later date that all such hope was abandoned. Therefore it is quite clear that the foundation of the judgment in the Court of Appeal fails, in point of fact. It is impossible to draw a line at the 1st of February and to say that nothing after that date can be general average. Indeed, I come to the conclusion that the whole of the cargo was discharged, as far as appears upon the correspondence and evidence, before it can be said that all hope of saving the ship was abandoned. If not all, at all events so nearly all that it is not worth while attempting to make the distinction. Therefore it was really admitted by the learned counsel for the respondents that the order of the Court of Appeal as it stood could not be supported. I may add that I should not myself be altogether prepared to admit that even if you were to draw a line as suggested at the 1st of February, and if before that date the cargo had been taken out of the ship for the purpose of saving it, and afterwards by a continuous operation the cargo was put in a place of safety, the expenditure necessary for that purpose though incurred after the 1st of February might not be fitly and properly treated as general average expenditure.

My Lords, the learned counsel for the respondents contended before your Lordships that the sum which was paid to Messrs. Adam was not properly distributed, and that it ought in the main, if it was payable at all, to be treated as a payment made on account of the freight. No great stress was laid at the Bar upon the amount. The learned counsel did not seek to ask your Lordships to disturb the finding of Lawrance J. that whatever portions of the adventure it ought to be attributed to it was not an unreasonable sum in itself, having regard to all the circumstances. But the learned counsel also argued that the sum of £750, which was paid to Messrs. Anderson Anderson & Co., in so far as it represented work done by Messrs. Anderson Anderson & Co. on behalf of the shipowner which the shipowner might have performed himself (under circumstances to which I will call your Lordships' attention presently), could not be treated as payable by any of the other interests than the shipowner; that it merely represented the discharge of a duty incumbent upon the shipowner himself, and ought not to be brought into the general average account at all. They also contended that, so far as it was properly brought into the average account, in regard, for example, to the services rendered by Mr. Gavin Anderson in France, it had not been properly distributed, that it ought to fall substantially on freight, and not be charged as it had been to other interests. The third point which they raised was that the 2½ per cent. commission, which was charged in connection with the sale of the unidentified wool, was an amount which the shipowner must himself bear and could not be charged to any of the other interests.

My Lords, those were the points which were argued before this House, and I think it was clear in the course of the argument that the main contest was whether the charges by Messrs.

Anderson Anderson & Co. were such as could be made against other interests at all, whether they did not merely represent work of the shipowner which he ought to have done himself, or which if he chose to employ others to do, he must treat as if he had done himself, and therefore could not charge anybody else in respect of it. The same with regard to the 2½ per cent. There was no attempt or desire to reopen the whole of the average statement, and therefore I do not propose to deal with it except so far as it relates to the particular items to which I have called attention.

The cargo, as I have said, was brought up to the top of the cliff at Audresselles. The case on behalf of the respondents was this, that it was then saved, that it had been rescued from sea-peril and was no longer in any such peril, that all the expenditure after that date, except such as might relate to the mere drying of the wool, or putting it in a position to dry, was expenditure by the shipowner on his own account in order to earn his freight, and that, consequently, it could be charged only against freight, not as general average; that it could not be charged against the cargo, nor against the cargo and freight. I think the learned counsel were right in saying that the money paid for superintendence, whether to Messrs. Adam or to Mr. Gavin Anderson, must be dealt with in the same way as the expenditure on the work to which the superintendence was applied.

Therefore, my Lords, the question which arises is whether the contention of the respondents is well founded with regard to the expenditure incurred in the carriage of this wool from Audresselles to Boulogne—a distance, I believe, of twelve miles—where it was taken in carts. Their argument is this: The owner of the ship was at liberty to carry it on in order to earn his freight. In being taken from Audresselles to Boulogne it was in transit on this journey, which was ultimately completed by its being reshipped at Boulogne and brought over to London; and, therefore, all the expenditure, whether the cost of carriage or the cost of superintendence, must be regarded as expenditure by the shipowner on his own account for the purpose of earning his freight.

My Lords, I do not suppose that it can be doubted that if it were the true view of the facts that the expenditure was, and could only be regarded as, incurred for that purpose, it was expenditure which the shipowner must himself bear. But then it is said on behalf of the appellants that that is an erroneous view, that the cargo, which was a perishable cargo, had been wetted by sea-water, and it would have been absolutely impossible, with any regard to the interests of the owners of the cargo, to leave the wool where it had first been put, namely, in a field just above the scene of the disaster at Audresselles—that if the interests of the cargo alone had been regarded, any prudent person would have taken the wool to Boulogne, where it could have been properly dealt with on the quay or put into a fit and proper warehouse. Therefore, it is said, in the first place, this was general average expenditure, because it was in respect of continuous acts from the time of the commencement of the salvage for the benefit of both ship and cargo (when you discharge the cargo you at the same time lighten the ship and the landing of the cargo is thus for the common benefit), and that until the cargo can be placed in a position of safety it is all general average; or in the second place, it is said, if that is not to be regarded as general average, still it may be regarded as having been done on behalf of the cargo even more than with the view of earning freight; and for this reason, that the shipowner acting on behalf of the cargo-owner was, obviously, under the circumstances of such a disaster as this bound to take all reasonable means to place the cargo in a position of safety. If the cargo had not been of a perishable description, probably his duty would have terminated at Audresselles as soon as the wool had been got out of reach of the sea; but with a cargo which might deteriorate from exposure to the weather and become entirely destroyed if further steps were not taken to protect it, he would have been bound, it is said, even if he had made up his mind not to carry it on to its destination in his own interest, to take it on to Boulogne just as he did; and, therefore, as he was not bound at any particular time to make his election, but might make it at any reasonable time, he cannot be said to have been doing this on behalf of the freight,

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inasmuch as, if he had determined when it came to Boulogne not to carry it on, the expenditure would equally have been incurred, and it must then clearly have fallen upon the cargo, and could not be said in any respect to have had reference to freight.

The third alternative which was put was this: It may be regarded, it is said, as expenditure on account both of cargo and freight which ought to be charged to both. It was carried, on the one hand, for the purpose of placing the cargo in a position of safety, and, on the other hand, for the purpose of enabling the shipowner to earn his freight; and, therefore, it is properly chargeable to both.

Those three alternatives were presented to your Lordships by the learned counsel for the appellants. It is obvious that the respondents can only succeed in their contention if they can establish that this expenditure must be regarded as having been made on behalf of freight only. Either of the other alternatives is fatal to them. If it was general average, if it was to be charged against cargo, or if it was to be charged against cargo and freight, they must equally fail.

My Lords, I cannot entertain any doubt that one or other of the three contentions on the part of the appellants must prevail. It seems to me that when once the conclusion of fact which I have stated is arrived at, that the cargo was not safe where it was at Audresselles, and that if the safety of the cargo alone be regarded it ought to have been taken to Boulogne, it is impossible to say that this can be treated as an expenditure on account of freight. It is said that when the expenditure was incurred the shipowner had already determined and elected to carry the cargo on, and that therefore, as he had made that election, he may be regarded as doing it on account of his freight, even although incidentally it benefited the cargo. I can see no act of election such as is contended for. It is true that the shipowner had looked out for vessels, and had made certain agreements with certain persons, with a view to the carriage of this cargo; but if those persons had refused to carry out their contracts, or if freights had gone up very much, he might have changed his mind, and never have shipped this cargo at all. He had done no act which conclusively determined his election. Down to the time when this cargo arrived at Boulogne and all the expense in question had been incurred, it was perfectly open to the shipowner to say, and he would have incurred no liability to anybody if he had said, "I shall not carry it on, because it will not answer my purpose to do so." My Lords, under those circumstances it seems to me impossible to say that this expenditure can be treated as chargeable against the freight. It is not necessary to say whether it is to be treated as a general average charge, or whether it is to be treated as a charge against cargo, or whether it is to be treated as a charge against cargo and freight. One or other of those views, according to my judgment, must be the correct one, and it is not essential to determine which.

My Lords, that really disposes of the case, except so far as regards the question whether the charges by Messrs. Anderson Anderson & Co. could properly be made at all. The contention on behalf of the respondents was that the matter was concluded by a decision in the Queen's Bench Division, in the case of *Schuster* v. *Fletcher* (1), and that the shipowner ought to have himself done all those things which Messrs. Anderson Anderson & Co. did, or that if he chose not to do them himself he could not make any charge in respect of them. My Lords, I will allude presently, somewhat in detail, to the case of *Schuster* v. *Fletcher* (1), but I will deal first with the matter apart from authority. There is no doubt that when a disaster of this kind happens the shipowner is bound to use his best endeavours in the interests of all concerned; but whether he is to do everything himself and what he ought to do himself without making a charge for it, must, it seems to me, depend upon the circumstances of the case; there can be no rigid rule of law laid down with regard to it. It would in some cases, as it strikes me, be most unreasonable not to allow the shipowner to employ others to do the work, whilst in other cases it would be most unreasonable that he should, or that if he did, he should make any charge in respect of it. Now what were the circumstances here? The shipowner was at Aberdeen; this disaster happened on the coast of France. In an emergency of this description time is of the utmost importance. It is quite true, as was said, that the shipowner might have come up to London; he might have looked about and made inquiries as to the tugs that would be available, and as to what would be the best steps to be taken. These are not matters within the every-day experience of every shipowner wherever a disaster may happen, and cannot be reasonably assumed to be so; and the disaster and damage occasioned by delay under such circumstances may very greatly outweigh the expenditure which is incurred in employing a person who does know about such things, who is accustomed to deal with them, and who will therefore be able promptly to send the requisite aid, or take the best steps to cause the disaster to be as small as possible.

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Now, my Lords, in this case the shipowner, who was in Aberdeen, employed a firm in London who had had experience in operations of this description; and what was the result? That steps were taken with the greatest promptitude, that tugs were on the spot very early and an arrangement made with them, that an experienced man was sent over to look after the interests of those concerned, that very speedily an arrangement was made with a French firm accustomed to deal with such matters, and whose influence and position, no doubt, in a foreign country greatly facilitated the proceedings. Under those circumstances, how can it be said that a shipowner who takes that course, and who would really, if he had attempted to do the thing himself, have been acting most prejudicially for the interests of all concerned, ought to bear the expenditure, which is an extraordinary expenditure, incurred for the benefit of all concerned in the undertaking? My Lords, I know of no principle of law which prohibits a shipowner acting in such a reasonable manner, or which prohibits him, if he so acts and the disaster thus leads to extraordinary expenditure, seeking to distribute that extraordinary expenditure over the interests which were sought to be protected, and were protected and benefited by it.

So much, my Lords, with regard to the principle. I quite concede that a shipowner owes a duty to all interested—that he is bound to discharge that duty—that he cannot throw the expense of doing what he ought to do himself upon some other interests because he chooses to employ somebody else. Whilst conceding that, it appears to me clear that there are many cases where the employment of others is a reasonable and right course to take; and where by such employment extraordinary expenditure is incurred for the general benefit, I am at a loss to see why it may not be distributed amongst those who receive the benefit.

Well, but then it is said that the contrary principle has been laid down in *Schuster* v. *Fletcher* (1). I am bound to admit that I have a good deal of difficulty in ascertaining what principle, if any, was laid down in *Schuster* v. *Fletcher* (1). With all respect to the learned Judges who took part in it, I cannot call it a very satisfactory case. If it is supposed to have laid down that under no circumstances may a shipowner employ others to do work for him at a distance from the place where he carries on his business, which, if it had happened at the place where he carries on his business, he would have been bound to do himself, then all I can say is, that I respectfully altogether dissent from it. If it does not lay down that general principle it is difficult to see what principle it can be said to lay down that would be applicable to, or govern, this case. There the circumstances as regards the occurrences to the ship were very similar to the present. "A ship during her voyage from India to London was stranded on the coast of France. The shipowner despatched his manager and other persons to take part in the necessary salvage operations, and the whole of the cargo was saved, transhipped, and brought forward to London and the freight earned. Part of the cargo which could not be identified was sold by the shipowner by arrangement with the consignees through a broker who received his brokerage"—that is, the brokerage question with which I will deal in a moment. "In the average statement a remuneration to the shipowner for 'arranging for salvage operations, receiving cargo, meeting and arranging with consignees and receiving and paying proceeds and generally conducting the business,' was charged partly to general average, and partly as particular average on the several interests rateably, the average-stater thinking that the amount was a reasonable remuneration to the shipowner for his services and for commission on the sale of unidentified cargo, and on disbursements:—*Held*, that under the circumstances the amount was improperly charged and could not be recovered, there being no contract on the part of the owners of the cargo to remunerate the shipowner for his services, a great part of which had been rendered with the object of earning his freight." It will be observed that in the 14th paragraph of the case it was alleged that, "The defendant incurred considerable trouble in chartering ships to carry on the cargo from Boulogne to London and in sending out lighters and necessary appliances to Boulogne and in the identification of so much of the cargo as was identified." The case was somewhat confused by reason of the introduction of the firm of Messrs. G. H. Fletcher & Co., who seem to have taken some part in these operations, G. H. Fletcher & Co. being a firm of which the defendant had formerly been, but was not then, a member, and some of this work appears to have been done by them. The charge made in respect of this work was a sum of £2500. The case stated that, "The sum of £2500 does not represent any sum which the defendant has paid, or rendered himself liable to pay to G. H. Fletcher & Co." The average-stater thought that it "was a reasonable remuneration to the defendant as shipowner in respect of his services hereinbefore mentioned and in respect of his advances for disbursements."

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Now in the judgment of Cockburn C.J. he says: "Our judgment must be against the shipowner, for the charge is one which cannot be supported. It divides itself into two heads, one for getting the ship away from the place where she stranded, and the other for trouble taken in transhipping the cargo, identifying part of it and arranging for the sale of another part which could not be identified. I think these services have nothing in common with general average. General average presupposes some sacrifice for the benefit of the whole adventure, which must be borne equally by all. Here the shipowner had an interest in getting

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the ship off and bringing the cargo into port in order that he might earn his freight. He cannot be allowed to throw the whole cost of these proceedings upon those who to some extent share in the benefit from them." If he was attempting to do that, it would certainly be a most unreasonable thing. "A great deal of what he has done was in the performance of his own contract. He was bound to use every effort to convey the cargo safely to its destination, and could only give up the task when it was hopeless." My Lords, I think that that is an overstatement of the law. He might elect to carry it on after the ship had been lost, but he was not bound to do so. "It cannot be said that the task was hopeless when he was able at the cost of some trouble to bring the cargo into port." That is all that was said upon that point.

Mellor J. says: "I am of the same opinion on both points. Mr. McLeod has argued that the consignees stood by while the shipowner was taking extraordinary trouble and ought therefore to recompense him for it. But the defendant was really doing nothing more than his own interests required him to do."

Now, my Lords, in that case it may be that the defendant did nothing more as regards that part of the operation than as a shipowner he was bound to do, and did not employ anybody, or incur any liability, or pay anything in respect of it; but, as I have said, I cannot see that it anywhere lays down the principle that if a shipowner employs another firm reasonably and properly and incurs extraordinary expenditure by so doing, if he so employs them and incurs that expenditure not only for his own benefit but for the general benefit, and in the hope of averting further disaster, he cannot charge that expenditure against the interests concerned.

In the present case I have given my reasons for thinking that the learned judge who tried this action was right in his conclusion, that this was an expenditure properly and reasonably incurred by the shipowners, the appellants, and if so incurred I have stated that I think that it cannot be charged only to freight, and that therefore the contention of the respondents fails.

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My Lords, there remains only the question of the 2½ per cent. commission on the sale of the unidentified wool. That point also arose in *Schuster* v. *Fletcher* (1). It was said in paragraph 22: "Where unidentified goods have to be sold and the sale is managed not by the shipowner himself but by the ship-broker, or some third person, a commission to such person (in addition to the selling broker's brokerage) is charged and allowed." Therefore the practice had apparently been, down to that time, to charge and allow the brokerage. With regard to that point the Lord Chief Justice says: "As to the expense incurred in respect of the articles which were" "unidentified he took no further trouble, but sold them through a broker, who received his brokerage." My Lords, the point raised seems to me to be this, and it also strikes me as a question of fact and not of law. In putting the unidentified goods into the hands of a commission merchant for sale, would the shipowner be acting in a reasonable and proper manner, or ought he himself to have arranged with the selling broker, and therefore be entitled to charge no more than the selling broker's half per cent. brokerage? My Lords, the learned judge who tried the case has found that this was reasonable; it has been allowed by the average-stater, and unless in point of law it can be said to be a charge which, under no circumstances, can properly be made, it would be impossible for your Lordships on the argument of this case, and at this stage, to enter upon such an inquiry and to determine whether the charge of 2½ per cent. made under such circumstances was a reasonable charge. A shipowner, of course, is not bound to sell himself; in selling he may do what is reasonable and fair and just under the circumstances. He has no business to incur expense unreasonably, to put money unnecessarily into other people's pockets prejudicially to the cargo-owner. Of that there cannot be the slightest doubt. But if it be an ordinary and reasonable course on the part of one who has goods to sell to put them into the hands of a firm, such as Anderson Anderson & Co., and to pay them this commission, then I can see nothing in point of law to prevent the commission being a proper charge as against the owners of the cargo of wool which had to be sold for their benefit, and being therefore a proper deduction from the proceeds to be divided among the parties interested.

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My Lords, I desire to say upon both those last points that I should be very sorry to encourage any attempt on the part of a shipowner, on the happening of a disaster such as occurred here, to refrain from personally using all reasonable exertions, and taking all reasonable steps, and unnecessarily and unreasonably to incur expenditure for work which he might equally well have done himself, and then to seek to cast that expenditure upon others who are interested in the adventure. All that we have to do here, however, is to determine the question of law, and it appears to me that if *Schuster* v. *Fletcher* (1) did lay down any such rigid rule as was insisted upon by the learned counsel for the respondents, then that decision cannot be regarded as good law. I doubt very much whether it was ever intended to lay down any such rigid rule at all. I think it must be looked at in relation to the facts; certainly, if it laid down any new principle, a less precise and satisfactory enunciation of a principle it is impossible to conceive. My Lords, whilst fully adhering to the view that the shipowner must discharge his own duties thoroughly and efficiently, I think that where he acts reasonably in incurring extraordinary expenditure for the benefit of the adventure generally, there is nothing in point of law that prevents his charging that expenditure upon those who are interested.

I therefore move your Lordships that the judgment appealed from be reversed, and the judgment of Lawrance J. restored, with the usual result as to costs.

LORD WATSON :—

My Lords, I shall simply express my entire agreement with all the observations which have just been made by the Lord Chancellor. My noble and learned friend, Lord Halsbury, who has been compelled to leave the House, has desired me to state his concurrence in the judgment proposed.

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My Lords, I concur.

Order of the Court of Appeal so far as appealed from reversed and the judgment of Lawrance J. restored, with costs here and in the Court of Appeal; cause remitted to the Queen's Bench Division.

Lords' Journals 20th March 1894.

Solicitors for appellants: *Parker, Garrett, & Parker.*
Solicitors for respondents: *Waltons, Johnson, Bubb, & Watton.*

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ENDOWED SCHOOL—32 *&* 33 *Vict. c.* 56, *s.* 39—*Policy of a Scheme—Powers of the Commissioners —Religious Education — Rights of Patronage— Modern Endowment—Welsh Intermediate Education Act*, 1889, *s.* 13.] In an appeal under sect. 39 of the Endowed Schools Act, 1869, against a scheme framed by the Charity Commissioners under the Welsh Intermediate Education Act, 1889:—*Held*, that the policy of the scheme cannot be considered. It can only be modified so far as it is not within the legal powers of its framers.—Where there was no direction to that effect in the original instrument of foundation, nor any regulations prescribed by the founder or under his authority in his lifetime or within fifty years after his death, the scheme need not provide for instruction in religion according to the Established Church. Such regulation cannot be presumed from any practice to that effect which may have obtained for many years.—*In re St. Leonard, Shore-*

ENDOWED SCHOOL—*continued.*

ditch, Parochial Schools (10 App. Cas. 304), followed.—Sect. 13 of the Act of 1889 does not apply to rights of patronage which are not, at the date of the Act, exercised by a member of the governing body or possessed in consequence of his gift or donation.—A modern endowment under the Welsh Act is one which has been given since the Act of 1869. Such endowment applied in fitting up a crypt, being part of the old endowment, as a chapel, is so mixed therewith that it cannot be conveniently separated therefrom, and must be deemed to be part thereof. In re Free Grammar School in Swansea - - - - - 252

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HARBOUR—*Ship—Wreck—Obstruction to Harbour—Expenses of Removal—Liability of Shipowner—Harbours, Docks and Piers Clauses Act,* 1847 (10 *&* 11 *Vict. c.* 27), *s.* 56—*Removal of Wrecks Act,* 1877 (40 *&* 41 *Vict. c.* 16), *ss.* 4, 6, 8.] A ship belonging to the appellants came into collision with another vessel and sank near the approach to a harbour where it was an obstruction to the navigation. There was no evidence of negligence on the appellants' part. The appellants gave their underwriters notice of abandonment as a total loss and were paid on that footing, and also gave the harbour authority notice of the abandonment. The harbour authority, acting under the Harbours, Docks and Piers Clauses Act 1847 and the Removal of Wrecks Act 1877, took possession of the wreck, raised part of the cargo and sold it, dispersed the wreck by explosives, and after deducting the proceeds of the cargo from the expenses sued the appellants for the balance under s. 56 of the Act of 1847:—*Held,* reversing the decisions of Gorell Barnes J. and the Court of Appeal, that the appellants were not liable; because although owners of the ship when she became an obstruction, yet having abandoned her before the expenses were incurred, they were not "the owners" within the meaning of s. 56 of the Act of 1847 and were therefore not personally liable for the repayment:—Also, by Lord Macnaghten, because the expenses cannot be recovered from the owner where the wreck has been removed by destruction, since the Act of 1847 only gives the harbour authority power to "remove" and not to "destroy."—By Lord Herschell L.C. and Lords Watson and Macnaghten: —Sect. 56 of the Act of 1847 makes the owner of the wreck personally liable for the repayment of the expenses of removal; contrà by Lord Ashbourne.—*Earl of Eglinton* v. *Norman* (46 L. J. (Ex.) 557; 3 Asp. M. L. C. (N.S.) 471) overruled. Arrow Shipping Company *v.* Tyne Improvement Commissioners. The "Crystal" - 508

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LICENSING ACTS—*Renewal of Licence—Licensed Person—Public House—Appeal to Quarter Sessions —Justices equally divided—Adjournment—Licensing Act* (9 *Geo.* 4, *c.* 61), *ss.* 9, 27.] Sect. 9 of the Licensing Act 1828 (9 Geo. 4, c. 61)—which enacts that when any question touching the granting, withholding, or transferring any licence shall arise "such question shall be determined by the majority of justices, not disqualified, who shall be present when such question shall arise" —has no application to Courts of Quarter Sessions

LICENSING ACTS—*continued.*

sitting on appeal.—At the hearing of an appeal to Quarter Sessions against the refusal to renew a licence the Court consisting of four justices was equally divided. Doubts being entertained as to the power of adjournment one of the justices in favour of the appeal withdrew and the appeal was dismissed:—*Held*, affirming the decision of the Court of Appeal, that the appeal had been heard and determined and that the appellant was not entitled to a mandamus to the Quarter Sessions to hear and determine it. Ex parte Evans - - - - - - - 16

2. —— *Renewal of Licence—Licensed Person—Public House—Beer Licence—Notice of Objection—Omission to state Grounds of Refusal—The Wine and Beerhouse Act* 1869 (32 & 33 *Vict. c.* 27) *ss.* 8, 19—*The Wine and Beerhouse Amendment Act* 1870 (33 & 34 *Vict. c.* 29) *s.* 7—*The Licensing Act* 1872 (35 & 36 *Vict. c.* 94) *s.* 42—*The Licensing Act* 1874 (37 & 38 *Vict. c.* 49) *s.* 26.] Sect. 42 of the Licensing Act 1872 enacts that where a licensed person applies for the renewal of his licence the licensing justices shall not entertain any objection to the renewal, unless written notice of an intention to oppose the renewal has been served on the holder not less than seven days before the commencement of the general annual licensing meeting; provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made adjourn the granting any licence to a future day. By s. 26 of the Licensing Act 1874 a notice served under s. 42 of the Act of 1872 shall not be valid unless it states in general terms the grounds on which the renewal is to be opposed.—Where notice of an objection to the renewal of a licence has been served on the holder not less than seven days before the commencement of the general annual licensing meeting, and the renewal is refused, and the holder appeals to Quarter Sessions, all the objections which were open before the licensing justices are open before the Quarter Sessions.—Under ss. 8 and 19 of the Wine and Beerhouse Act 1869, read together with s. 7 of the Wine and Beerhouse Amendment Act 1870, where an application is made to licensing justices for the renewal of certain beer licences, it shall not be lawful for the justices to refuse the renewal except upon one or more of four specified grounds, of which the fourth is that the applicant or the house in respect of which he applies is not duly qualified as by law is required, and where the application is refused on the ground that the house is not qualified, the justices shall specify in writing to the applicant the grounds of their decision.—The holder of one of such licences applied to the licensing justices for a renewal, having been served with a notice of objection not less than seven days before the commencement of the general annual licensing meeting. The justices refused the renewal but omitted to state the grounds of their decision. The holder appealed to Quarter Sessions, and was not served with any fresh notice of objection. When the appeal came on to be heard the appellant contended that as the justices had stated no grounds for their decision it ought to be reversed and the licence granted. The Court overruled this contention and proceeded to hear the case on the merits, whereupon the appellant withdrew declining to take any further part in the proceedings. The Court heard the appeal and dismissed it:—*Held*, affirming the decision of the Court of Appeal, that the appeal had been heard and determined and that the appellant was not entitled to a mandamus to the Quarter Sessions to hear and determine it.—*Reg.* v. *Sykes* (1 Q. B. D. 52) and *Ex parte Smith* (3 Q. B. D. 374) commented on. Ex parte Gorman - - - - - 23

3. —— *Renewal of Licence—Discretion of Justices to refuse Transfer—Licensing Act,* 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Wine and Beerhouse Act,* 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19—*Wine and Beerhouse Act Amendment Act,* 1870 (33 & 34 *Vict. c.* 29), *s.* 7.] A licence for the sale of beer had been held for a house from a date before the 1st of May 1869 continuously down to the 10th of October 1891, when it expired, the tenant's application for a renewal having been refused in September. On the 9th of October 1891 a new tenant gave notice that he intended to apply, and on the 17th of November he did apply, to the justices in special sessions for a transfer of the licence under 9 Geo. 4, c. 61, s. 14:—*Held*, affirming the decision of the Court of Appeal ([1893] 1 Q. B. 635), that under sect. 19 of the Wine and Beerhouse Act 1869 and sect. 7 of the Amendment Act 1870 the justices were not restricted to the four grounds of refusal specified in the Act of 1869, but had a general discretion; since the restriction applies only where there has been a licence in existence continuously from a date before the 1st of May 1869 down to the date of the application.—*Reg.* v. *Curzon* (Law Rep. 8 Q. B. 400) approved. Freer *v.* Murray 576

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MASTER AND SERVANT—*Wages—Payment otherwise than in Current Coin—Deductions for Sick and Accident Club—Truck Act* (1 & 2 *Wm.* 4, *c.* 37), *ss.* 1, 2, 3, 4, 24.] A payment made by an employer, at the instance of a person employed, to discharge some obligation of the person employed, or to place the money in the hands of some person in whose hands the person employed desires it to be placed, is within the meaning of sects. 3 and 4 of the Truck Act (1 & 2 Wm. 4, c. 37) a payment to the person employed as much as if the current coin of the realm had been placed in his or her hands.—The appellant entered the service of the respondent and signed an agreement to conform to all the rules and regulations of the respondent's works. One of the regulations was that all employés were to become members of the sick and accident club. In accordance with the rules of this club weekly payments were made to the club treasurer, and from the fund thus established relief was given to the members in case of sickness or accident. The appellant received each week a ticket shewing the gross amount of wages due to her and the weekly deduction on account of the payment to the club, the balance alone being paid to her. She never

MASTER AND SERVANT—*continued.*
required and never received any relief from the fund. After leaving her employment the appellant brought under sect. 4 of the Truck Act an action against the respondent to recover the amount of the weekly payments to the club thus deducted from her wages:—*Held*, that within the meaning of sects. 3 and 4 of the Truck Act the entire amount of the wages payable to the appellant had been actually paid to her in the current coin of the realm, and that she was not entitled to recover from the respondent the amount of the deductions:—Also, that even assuming (but without deciding) that there was in this case a contract which was made illegal, null and void by sect. 2 of the Truck Act, the respondent by making the weekly payments to the club with the assent of the appellant had discharged his obligations to her.—The decision of the Court of Appeal ([1892] 2 Q. B. 662) affirmed. HEWLETT *v.* ALLEN - - - - - 383

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—— Registration—Priority—Law of New South Wales - - - - 260
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—— Master and servant—Fellow-servant—Common employment - - - 222
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POOR LAW—*Settlement—Residence while under Sixteen apart from Parent—Irremoveability—* 9 & 10 *Vict. c.* 66, *s.* 1—11 *&* 12 *Vict. c.* 111, *s.* 1—*Divided Parishes and Poor Law Amendment Act,* 1876 (39 *&* 40 *Vict. c.* 61), *s.* 34.] A pauper, nearly fourteen years old, went into domestic service in the parish of L. in the West Ham Union, remained there nearly four years, left before she became eighteen and resided outside that union with her mother. The pauper's father died when she was two years old. The widowed mother never resided in or acquired a status of irremoveability from or a settlement in that union:—*Held*, reversing the decisions of the Queen's Bench Division and the Court of Appeal ([1892] 2 Q. B. 65, 676), that upon the true construction of 9 & 10 Vict. c. 66, s. 1, and 11 & 12 Vict. c. 111, s. 1, and the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34, the pauper had not resided for the term of three years in the parish of L. in such manner and under such circumstances in each of such years as would in accordance with the statutes in that behalf render her irremoveable, and that she had not therefore acquired a settlement in the West Ham Union.—*Reg.* v. *Leeds Union* (4 Q. B. D. 323) disapproved. GUARDIANS OF POOR OF WEST HAM UNION *v.* CHURCHWARDENS, &C., OF ST. MATTHEW, BETHNAL GREEN - 230

POOR-RATE — *Procedure* — *Valuation List* — *Appeal against Totals* — *Valuation of Property* (*Metropolis*) *Act,* 1869 (32 *&* 33 *Vict. c.* 67, *s.* 32.] By sect. 32 of the Valuation of Property (Metropolis) Act 1869 "any body of persons authorized by law to levy rates or require contributions payable out of rates in the metropolis . . . may appeal to the assessment sessions, if they feel aggrieved by reason (1.) of the total of the gross value of any parish being too high or too low; (2.) of the total of the rateable value of any parish being too high or too low." The London County Council, as such a body of persons, appealed to the assessment sessions against the totals of the gross and rateable values of a parish in the county of London on the ground that a large number of specified hereditaments in the parish were

POOR-RATE—*continued.*
assessed below their true value:—*Held*, affirming the decision of the Court of Appeal ([1893] 2 Q. B. 476), that assuming—but without deciding—that the London County Council were "aggrieved" within the meaning of sect. 32, there was nevertheless no right of appeal against totals upon the ground that particular hereditaments were assessed below their true value. London County Council *v.* Assessment Committee of St. George's Union - - - - 600

PRACTICE—NEW SOUTH WALES—Criminal law - - - - 57, 560
See Privy Council Appeals — New South Wales. 2, 3.

PRACTICE—PRIVY COUNCIL - 283, 284
See Privy Council—Practice. 1, 2.

PRACTICE — SUPREME COURT — *Parties — Plaintiffs, Joinder of—Causes of Action—Joinder of Several Plaintiffs in respect of Separate Causes of Action—Rules of Supreme Court, Order XVI. r.* 1; *Order XVIII. rr.* 1, 8.] Order XVI. r. 1 deals merely with the parties to an action, and has no reference to the joinder of several causes of action.—Bales of cotton were shipped by several shippers upon a general ship for carriage to Liverpool, the bills of lading being similar. Upon arrival it was found that the number of bales landed fell short of those shipped, and that some of the landed bales could not be identified, their marks having been obliterated. These latter bales were sold and their proceeds distributed proportionately among the several consignees. Sixteen holders of bills of lading, nine being shippers and seven consignees, joined in one action against the shipowners claiming damages for non-delivery of the number of bales specified in their bills of lading respectively:—*Held*, that the causes of action of the several plaintiffs were separate and distinct, and could not be joined in one action under Orders XVI. and XVIII., or otherwise.—The decision of the Court of Appeal ([1893] 2 Q. B. 412) reversed, and the decision of the Queen's Bench Division restored. Smurthwaite *v.* Hannay - - - 494

PRINCIPAL AND SURETY—*Debtor and Creditor—Partnership Debt—Retiring Partner—Giving Time—Overdraft—Release of Surety.*] Where two or more are indebted as principals and it is afterwards agreed between them that as between themselves one shall be a surety only, and this agreement is made known to the creditor, the rule as to the discharge of a surety by giving time to the principal debtor applies: see *Oakeley* v. *Pasheller* (4 Cl. & F. 207; 10 Bli. (N.S.) 548) and *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (Law Rep. 7 H. L. 348).—The appellant and others being in partnership, a deed of dissolution was made whereby the appellant assigned his interest to the other partners, who covenanted with him to pay the partnership debts and to indemnify the appellant against them, with a proviso that he should not be entitled to require them to pay any of the debts so long as he was kept indemnified. Among the debts was an overdraft of £50,000 due to the respondents, a banking company. After the dissolution, the terms of which were made known to the respondents, a transaction was entered into between the new firm and the respondents whereby the new firm were allowed for a limited period to increase the overdraft to £53,000:—*Held*, that there was under the circumstances no agreement to give time to the new firm or to alter the relation between the parties, and that the respondents had not released the appellant.—The decision of the Court of Appeal ([1894] 2 Ch. 32) affirmed upon the above ground. Quære, whether the proviso had the effect given to it by the Court of Appeal. Rouse *v.* Bradford Banking Company - 586

PRIVY COUNCIL APPEALS—CANADA—*British Columbia*—47 *Vict. c.* 14, *s.* 23—*Construction—"Actual settler for agricultural purposes"—Right of Pre-emption.*] Where the appellant claimed as "an actual settler for agricultural purposes" that by sect. 23 of British Columbian Act, 47 Vict. c. 14, he was entitled to a right of pre-emption over certain lands included in a government grant for the purpose of the respondent railway, and it appeared that the land in question had, prior to the Act, been reserved as a town site:—*Held*, that a settler means a person entitled to record land under the Land Act, 1875, by reason of compliance with its provisions; that the Act did not apply to reserved lands; that under 47 Vict. c. 14, no new right of pre-emption was given, nor was the word "settler" used in any new sense. Accordingly, the appellant's claim failed, since he was not a settler in the only sense known to the law of the colony. Hoggan *v.* Esquimalt and Nanaimo Railway Company [429

2. —— *Manitoba—Deed of Grant—Exclusive Right of Railway to Portions of Streets in actual Occupation—Right to Refuse other Streets for Railway Purposes.*] Where a municipal council granted to a railway company authority to construct, maintain, and operate railways in its streets, with the exclusive right to such portion of any street as shall be occupied by the railway, but with the plain intent that the company should have no concern whatever with any portions of any street not in actual occupation by their rails:—*Held*, that a subsequent clause in the deed of grant giving to the company the refusal on terms of other streets in the city for railway purposes was insufficient to constitute, contrary to the plain meaning of the previous stipulations, a right of monopoly in any of the streets of the city.—*Quære*, whether if a monopoly had been conceded it was ultrà vires of the municipal council. Winnipeg Street Railway Company *v.* Winnipeg Electric Street Railway Company 615

3. —— *Ontario—British North America Act,* 1867, *ss.* 91, 92—*Powers of Local Legislation—Enactment ancillary to Bankruptcy Law—Revised Statutes of Ontario, c.* 124, *s.* 9.] *Held*, that the provisions of sect. 9 of Ontario "Act respecting assignments and preferences by insolvent persons" (Revised Statutes of Ontario, c. 124), which relate to assignments purely voluntary, and postpone thereto judgments and executions not completely executed by payment, are merely ancillary to bankruptcy law, and as such are within the competence of the provincial legislature so long as they do not conflict with any existing bankruptcy

PRIVY COUNCIL APPEALS—CANADA—*contd.* legislation of the Dominion Parliament. Attorney-General of Ontario *v.* Attorney-General for the Dominion of Canada - - 189

4. —— *Ontario—British North America Act, s.* 91, *sub-s.* 15; *s.* 92, *sub-s.* 13—*Validity of Dominion Bank Act* (46 *Vict. c.* 120)—*Negotiability of Warehouse Receipts — Construction.*] Although warehouse receipts granted to itself by a firm which has not the custody of any goods but its own are not negotiable instruments within the meaning of the Mercantile Amendment Act (c. 122 of the Revised Statutes), *held*, that the Dominion Bank Act (46 Vict. c. 120), while it was in force dispensed with that limitation, validated such receipts, and transferred to the indorsees thereof the property comprised therein:—*Held*, further, that the Bank Act was intrà vires of the Dominion Parliament.—Sect. 91, sub-sect. 15, of the British North America Act, 1867, gives to that parliament power to legislate over every transaction within the legitimate business of a banker, notwithstanding that the exercise of such power interferes with property and civil rights in the province (see sect. 92, sub-sect. 13), and confers upon a bank privileges as a lender which the provincial law does not recognise. — The legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in sect. 91, is of paramount authority even though it trenches upon the matters assigned to the provincial legislature by sect. 92.—*Cushing* v. *Dupuy* (5 App. Cas. 409) followed. Tennant *v.* Union Bank of Canada [31

5. —— *Quebec—Quebec Act* (42 & 43 *Vict. c.* 53), *s.* 12—*Expiry of Prescribed Time—Non-juridical Day.*] Where it was enacted by sect. 12 of 42 & 43 Vict. (Quebec) c. 53, that any municipal elector might demand the annulment of the corporate appropriation for expenditure within three months from the date thereof on the ground of illegality, but that thereafter the right was prescribed and the appropriation valid:—*Held*, that on the expiration of the three months the elector's statutory right was at an end, and could not be extended by any procedure clause (see sect. 3 of the Civil Procedure Code) which presupposed an existing right of action and regulated its exercise. Déchène *v.* City of Montreal [640

PRIVY COUNCIL APPEALS—CAPE OF GOOD HOPE—*Powers of Directors—Issue of Shares at a Discount—Damages.*] *Held*, in this case, that it was not competent for directors to issue shares at a discount, so as to make the holder liable for less than their full amount.—Where directors bonâ fide agreed, in consideration of a stipulated service, to allot shares at a discount and the allottee subsequently received certificates of fully paid-up shares, paid to the company the par value less 10 per cent. discount, and subsequently sold the same to bonâ fide purchasers at a profit:—*Held*, that the directors were answerable to the company for the discount allowed;—but *held*, that they were not liable beyond the discount, there being no proof of fraud against the company, or of further resulting damage to it from the transaction.—*Semble*, such further resulting damage could not have exceeded the difference between the price paid by the allottee and the presumable value of the shares at the date of the agreement if it and the transactions founded thereon had never taken place. Hirsche *v.* Sims [654

PRIVY COUNCIL APPEALS—CEYLON—*Fiscal Sale of Testator's Estate—Judgment against Executor who has not proved—Effect of Application for Probate.*] A creditor of a deceased debtor cannot sue a person named as executor in the will of the deceased unless he has either administered or obtained a grant of probate; and a sale in execution of a judgment obtained against such person does not bind the deceased's estate:—*Held*, overruling the Court below, that an order for probate without an actual grant thereof does not prove the will; and that an application for probate does not shew an executor's acceptance of its trusts.—*Douglas* v. *Forrest* (4 Bing. 686), cited by the Court below, explained and approved.—Letters of administration, even if irregularly granted, are valid till revoked. Mohamidu Mohideen Hadjiar *v.* Pitchey - - 437

PRIVY COUNCIL APPEALS—CHINA SETTLEMENTS — *Exchange Contracts — Condition precedent—Repudiation.*] Where bankers sold exchange contracts to the respondent, i.e., undertook to pay in exchange for silver sterling money or its equivalent within certain limits as to time at a specified rate, but stipulated that the goods in payment for which such silver was required should be financed through them:—*Held*, in actions on the exchange contracts, that financing the goods as stipulated was a condition precedent to the fulfilment of the exchange contracts. But both parties were placed under a mutual obligation to settle reasonable terms of financing, and as the bankers repudiated such obligation the respondent was entitled to judgment.—The evidence as to the parties' respective compliance with such condition precedent being in London, their Lordships directed it to be taken on commission instead of remitting the case to Shanghai. Bank of China, Japan, and the Straits *v.* American Trading Company - - 266

PRIVY COUNCIL APPEALS — CONSTANTINOPLE—*Navigation of Black Sea—Collision—Crossing the Bows of the Appellant—Duties of either Vessel.*] Where two steamships entered the Bosphorus from the Black Sea at the same time, both making at about equal speed for a point on the Asiatic side, and on reaching that point the respondent, being on the European side, crossed the bows of the appellant, notwithstanding the proximity of the land, the set of the current, and the fact that neither vessel had on it at the time much steerage way:—*Held*, that the Court below was wrong in pronouncing the appellant solely to blame for the collision. The respondent was to blame in the first instance, but the appellant was also in fault for not having reversed at once when the respondent's object was or ought to have been apparent. SS. "Nord Kap" *v.* SS. "Sandhill." The "Sandhill." [646

PRIVY COUNCIL APPEALS — CONSTANTINOPLE—*continued.*

2. —— *Navigation of Lower Danube, Art.* 32 *—Collision—Duties of Ascending and Descending Ships.*] Where a ship ascending the Danube finds itself exposed to the risk of meeting a descending ship at or near a point which does not afford sufficient breadth for passing:—*Held*, that art. 32 of the regulations applicable to the Lower Danube is imperative, and that the ascending ship is bound to stop and wait.—Although an ascending ship is clearly wrong in forcing her way contrary to art. 32, yet when her intention so to do is reasonably apparent, a descending ship commits contributory fault by insisting on her right of precedence. SS. "Diana" *v.* SS. "Clieveden." The "Clieveden" - 625

PRIVY COUNCIL APPEALS—CYPRUS—*Hatti Humaïoun of* 1856*—Law of* 11*th April,* 1884*—Law of Marriage—Legitimacy—Roman Catholic Ottoman subjects.*] *Held,* that by the law of Cyprus the legitimacy of a Roman Catholic Ottoman subject is to be ascertained by applying the canon law of the Roman Catholic Church.—*Held*, that by the canon law the infant appellants had been legitimated subsequent to their birth by the marriage of their parents authorized by papal dispensation.—*Held*, that by the Hatti Humaïoun of 1856 and the Cyprus Statute Law of 11th April, 1884, succession is regulated by creed, and accordingly the right to inherit in this case follows from the establishment of legitimacy. Parapano *v.* Happaz - - - 165

PRIVY COUNCIL APPEALS—INDIA—*Jurisdiction of Foreign Court—Decrees of Foreign Court against absent Foreigners—Personal Actions.*] No territorial legislation can give jurisdiction which any foreign Courts ought to recognise against absent foreigners who owe no allegiance or obedience to the Power which so legislates.—In all personal actions the Courts of the country in which the defendant resides, not the Courts of the country where the cause of action arose, should be resorted to.—Where a Faridkote Court passed ex parte money decrees against the defendant, who had been treasurer of Faridkote, but at the date of suit had ceased to be such, and was resident in Jhind, of which State he was a domiciled subject:—*Held*, that such decrees were a nullity by international law.—*Becquet* v. *Macarthy* (2 B. & Ad. 951) distinguished.—*Schibsby* v. *Westenholz* (Law Rep. 6 Q. B. 161) explained. Sirdar Gurdyal Singh *v.* Rajah of Faridhote . - - 670

PRIVY COUNCIL APPEALS—JAMAICA—*Bankruptcy—Jurisdiction to Annul Adjudication—Practice—Bankruptcy Law,* 1879, *s.* 151*—Act No.* 17 *of* 1877, *s.* 10*—Assignment of the whole of Debtor's Property.*] *Held*, that the judge sitting in Bankruptcy has jurisdiction to revoke a provisional order, or annul an adjudication under sect. 151 of the Bankruptcy Law, 1879. An application for that purpose need not be made to the Full Court under sect. 10 of No. 17 of 1877:—*Held*, that an assignment of the whole of the debtor's property, in consideration of a contemporaneous advance, and promise of further assistance, "in order to enable the debtor to carry on his business, and in the reasonable belief that he would thereby be enabled to do so," is not an act of bankruptcy.—*Ex parte King* (2 Ch. D. 256), *Ex parte Ellis* (2 Ch. D. 797), and *Ex parte Johnson* (26 Ch. D. 338), approved. Administrator General of Jamaica *v.* Lascelles, De Mercado & Co. In re Rees' Bankruptcy - - - 135

2. —— *Law* 12 *of* 1889, *ss.* 20, 29*—Compensation—Accommodation Works—Power of Statutory Officer to bind the Company.*] Where by a local Act the promoters of a railway company were authorized to take lands for the purposes of their undertaking to be acquired by them through a Government officer appointed under sect. 20, compensation being payable by the Government, and the owners of the lands being entitled by sect. 29 to such accommodation works as may be fixed by agreement at the time when the amount of compensation is being settled:—*Held*, that the statutory duty of conducting the assessment of compensation having been entrusted to such Government officer, the making of agreements for accommodation works was also within the scope of his authority, and he could within reasonable limits bind the company thereby, although the statutory duty of defraying the costs thereof was imposed upon the company. West India Improvement Company *v.* Attorney-General of Jamaica and Fraser - - - - - 243

3. —— *Mortgagee—Sale by Mortgagee after previous Sale to himself—Rights of Purchaser—Right of Mortgagee to Cost of Improvements.*] A mortgagee, his power of sale on default having arisen, sold the mortgaged premises by public auction, ostensibly to a third person, in reality to himself; took possession as owner, and subsequently sold the same, with improvements effected by himself, in full proprietary right to the appellant.—In a suit for redempton against the mortgagee and the appellant, *held*, that:—(1.) The evidence failed to establish that the mortgagee's abortive sale to himself was fraudulent.—(2.) The sale to the appellant was a valid exercise of the power contained in the mortgage deed, and extinguished the right to redeem.—(3.) Though it was the duty of the mortgagee to account to the mortgagors until the power of sale was validly exercised and to offer so to do, it was not the duty of the appellant to give notice to the mortgagors to that effect, or to see to the application of the purchase-money.—(4.) The mortgagee should be allowed the cost of his improvements, so far as they had enhanced the value of the premises.—*Shepard* v. *Jones* (21 Ch. D. 469) approved. Henderson *v.* Astwood. Astwood *v.* Cobbold. Cobbold *v.* Astwood - - - 150

PRIVY COUNCIL APPEALS — NEW SOUTH WALES—*Crown Lands Alienation Act, s.* 5*—Dedication of Lands as "Permanent Common"—Common of Pasturage—Construction.*] Where by notice under sect. 5 of the Crown Lands Alienation Act, which authorizes the dedication of Crown lands for any pasturage common or other public purpose, the Crown dedicated the lands in suit as "permanent common":—*Held*, that this dedication meant that the lands were to go for ever for the common or public enjoyment, so as to bring them within the operation of the Public Parks Act, and did not create a common of pasturage. Municipal Council of Sydney,

PRIVY COUNCIL APPEALS — NEW SOUTH WALES—*continued.*

Agricultural Society of New South Wales and Sydney Driving Park Club, Limited *v.* Attorney-General for New South Wales and Milroy - - - - - - 444

2. —— *Practice—Criminal Law Amendment Act of* 1883, *s.* 423—*Admissibility of Evidence—Evidence of Criminal Acts other than those Charged.*] Evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment is not admissible unless upon the issue whether the acts charged against the accused were designed or accidental, or unless to rebut a defence otherwise open to him.—Where prisoners had been convicted of the wilful murder of an infant child which the evidence shewed they had received from its mother on certain representations as to their willingness to adopt it, and upon payment of a sum inadequate for its support for more than a very limited period, and whose body the evidence shewed had been found buried in the garden of a house occupied by them, *held*, that evidence that several other infants had been received by the prisoners from their mothers on like representations and on like terms, and that bodies of infants had been found buried in a similar manner in the gardens of several houses occupied by the prisoners, was relevant to the issue which had been tried by the jury:—*Held*, that sect. 423 of the Criminal Law Amendment Act of 1883 (46 Vict. No. 17) does not on its true construction empower the Court to affirm a conviction where the evidence submitted to the jury was inadmissible and may have influenced the verdict. Makin *v.* Attorney-General for New South Wales - - - - - - 57

3. —— *Practice — Criminal Appeal — New South Wales Criminal Law and Evidence Amendment Act* (55 *Vict. No.* 5).] Where a prisoner applied for special leave to appeal in a criminal matter on the ground that the judge misdirected the jury in commenting upon the prisoner having refrained from giving evidence:—*Held*, that such comment was according to law, and that the Criminal Law and Evidence Amendment Act did not preclude it.—*Ex parte Deeming* ([1892] A. C. 422) followed. Kops *v.* The Queen. Ex parte Kops - - - - - 650

4. —— *Real Property Act — Application to bring Lands under* 26 *Vict. No.* 9 — *Caveat—Waiver of Lapse under sect.* 23.] Where an applicant to bring lands under the Real Property Act (26 Vict. No. 9) filed his case in Court under sect. 21, more than three months after a caveat had been lodged, and thereafter obtained an order that the caveator should file her case, which she accordingly did:—*Held*, that he had thereby waived his right to have the caveat set aside as lapsed under sect. 23.—*Phillips* v. *Martin* (11 N. S. W. L. R. 153) approved. Wilson *v.* McIntosh - - - - - - 129

5. —— *Registered Mortgage—Notice—*7 *Vict. No.* 16, *ss.* 11, 22—22 *Vict. No.* 1, *s.* 18.] Where the respondent had purchased at public auction eight lots of an estate and subsequently to the contract the vendor mortgaged by registered deeds the whole of the said estate including the said lots, to the appellant, who knew at the time of the advance that certain unspecified portions of the estate had been sold:—*Held*, that according to the true construction of 7 Vict. No. 16, ss. 11, 22, and 22 Vict. No. 1, s. 18, the appellant gained no priority from registration but took subject to the respondent's purchase. Sydney and Suburban Mutual Building and Land Investment Association *v.* Lyons - 260

6. —— *Trade Marks Act,* 1865 — *User of Trade-mark — Laches — "Maizena" — Publici juris.*] Where the appellants, in 1889, registered in the Colony under the Trade Marks Act, 1865, the word "Maizena," which they had invented in 1856, registered and enforced in other countries, but had for a quarter of a century allowed to be used in the Colony as a term descriptive of the article, and not of their own manufacture thereof:—*Held*, that the word had thereby become publici juris, and was no longer registerable as a trade-mark.—Where the respondents had applied the word to their own manufacture, but did not try to pass the same off as that of the appellants by the use of labels and packets calculated to deceive the public on that point; stating, on the contrary, the name of the maker, place of manufacture, and other necessary particulars:—*Held*, that they could not be restrained from so doing. National Starch Manufacturing Company *v.* Munn's Patent Maizena and Starch Company [275

7. —— *Trustee—*16 *Vict. No.* 19, *ss.* 30, 32—*Appointment of New Trustee by the Master—Vesting.*] Where an application for the appointment of a new trustee in the place of one incapacitated is, in the opinion of the Court, duly made and served, the Court has power, under 16 Vict. No. 19, ss. 30, 32, to appoint as prayed, and also to make a vesting order. According to the rule and practice in the colony, it can direct the master to appoint, and the vesting follows the appointment without any subsequent order. Plomley *v.* Richardson - - 632

8. —— *Will—Law of Wills before* 1840—*Construction—Words of Gift without Limitation.*] By English law of wills as it existed prior to 1 Vict. c. 26, words of gift conveyed only a life estate unless the devise contained words of limitation. Although the word "estate" or "property" or its equivalent, used in the operative part of the devise, would enlarge the gift; when used in another part of the will as a word of reference merely, it has not that effect. Hill *v.* Brown [125

PRIVY COUNCIL APPEALS—NEW ZEALAND—*Master and Servant—Common Employment—Negligence.*] Where a contract under which a ship was discharged of its cargo did not provide that the whole work was to be done by the stevedores, but reserved to the shipowners the employment and control of those members of their crew who worked the tackle of the ship used in such discharge:—*Held*, that the shipowners were liable to a servant of the stevedores for injuries occasioned to him by the negligence of a winchman, one of the crew. The winchman

PRIVY COUNCIL APPEALS—NEW ZEALAND—*continued.*
was not in the employ of the stevedores, nor subject to their orders and control. Union Steamship Company *v.* Claridge - - 185

2. —— *Master and Servant — Liability of Employer—Wrongful act of Servant within scope of his Employment.*] *Held*, that the defendant company was liable in damages for the act of its contractor in negligently and improperly lighting a fire on its land, and permitting it to spread to the plaintiff's lands; even though such contractor in so doing disregarded special stipulations contained in such contract relative to the time at which such fire should be lit. To escape liability the defendant must shew that the act of the contractor was that of a trespasser, and was not within the scope of his contract. Black *v.* Christchurch Finance Company - - 48

PRIVY COUNCIL APPEALS—QUEENSLAND—*Dividend Duty Paying Act,* 1890, *s.* 9—*Constructive Assets—Foreign Debts charged on Property in the Colony.*] Where debts are due to a company by debtors out of Queensland and will be payable out of Queensland, but are charged upon real and personal property in Queensland:—*Held*, that the interest of the company in such property is an asset of the company in Queensland within the meaning of sect. 9 of The Dividend Duty Act of 1890 (54 Vict. No. 10); to the extent at all events of the value of the incumbrance, and taking into account collateral securities held elsewhere than in Queensland for the same debts. Walsh *v.* The Queen - 144

2. —— *Order for New Trial reversed—Verdict—Conflict of Evidence.*] In an action for damages owing to the negligent construction of a drain, the jury found that there was no negligence, but the Full Court set aside the verdict and ordered a new trial:—*Held*, that this order must be discharged. There being evidence both ways, the verdict was one which the jury, viewing the whole of the evidence, could reasonably find. Council of the Municipality of Brisbane *v.* Martin - - - - - 249

PRIVY COUNCIL APPEALS—WESTERN AUSTRALIA—*Construction of Contract—Right to select Waste Lands.*] Where by contract between the appellant and the local government the former was entitled, in part consideration of constructing a railway, to select subsidy and compensation blocks of land within a prescribed area, and to call for grants thereof in fee simple in the form prescribed by the Land Regulations of the colony, and the latter was bound to abstain from making any grants or sales of land within such area to third parties during the currency of the contract:—*Held*, reversing the decision of the Court below, that by the true construction of the contract the appellant was entitled to select from all lands within such area which the Government was at the date of contract able to convey in fee simple, including such lands as had been previously proclaimed as town sites, but which had not by virtue of such proclamation been devoted to public uses or otherwise withdrawn from the Government's power of alienation. West Australian Land Company *v.* Forrest, Commissioner of Crown Lands - - - - - 176

PRIVY COUNCIL APPEALS—WESTERN AUSTRALIA—*continued.*

2. —— *Practice in Ejectment—Order* XIV. *of Supreme Court Rules—Order for Plaintiff to sign Judgment reversed.*] Where the plaintiff in ejectment claimed that the defendant was estopped by payment of rent from disputing his title:—*Held*, that the defendant, who alleged receipt of rent by the plaintiff as collector, was entitled to defend on the merits in the ordinary course, and that the Court was wrong in allowing judgment to be signed by the plaintiff under Order xiv. Jones *v.* Stone - - - - 122

PRIVY COUNCIL—PRACTICE—*Setting Aside Verdict — Evidence — Libel.*] In an action for libel, a jury of four by a majority found a verdict for the defendants; the Supreme Court set aside this verdict, and ordered a new trial:—*Held*, that this order must be discharged. There was evidence on which the jury could find that the defendant had not reflected upon the plaintiff's character.—The use of the word "Ananias," as applied to the plaintiff's newspaper, did not necessarily impute wilful and deliberate falsehood to him; whether it was used extravagantly or for the purpose of conveying an imputation on the plaintiff was a question for the jury. Australian Newspaper Company *v.* Bennett - 284

2. —— *Special Leave—Divorce Suit.*] Special leave to appeal granted against a decree of the Supreme Court, reversing a decree of the District Court, and dismissing a suit for divorce. Le Mesurier *v.* Le Mesurier - - - 283

PROBATE—Executor sued before grant - 437
See Privy Council Appeals—Ceylon.

PUBLIC-HOUSE—Licence - - 16, 23, 576
See Licensing Acts. 1, 2, 3.

PUBLIC POLICY—Restraint of trade - 535
See Restraint of Trade.

QUARTER SESSIONS—Appeal to—Licensing Acts - - - - 16, 23
See Licensing Acts. 1, 2.

RAILWAY—*Negligence—Robbery of Passenger — Refusal to Detain Train — Overcrowding of Carriage — Damages, Remoteness of.*] A statement of claim alleged in substance that the plaintiff, while a passenger in a train of the defendant company, which was then stopping at a railway station, was robbed by a gang of men who entered the carriage where he was then seated; that the plaintiff forthwith complained of the robbery to the station-master, but he refused to detain the train to permit the plaintiff to give the men into custody and have them searched, and immediately upon the plaintiff's complaint being made to him gave the signal for the train to leave, and it started, whereby the plaintiff was prevented from having the men searched and his property recovered; that there was in and about the station, as the station-master well knew, a large force of police ready and willing to effect the arrest for the plaintiff and to search those arrested, but they were prevented from doing so by the action of the station-master in starting the

RAILWAY—*continued.*
train; that the plaintiff's money was still in the carriage when the plaintiff made his complaint, and might and would then have been recovered had the station-master afforded time for the necessary search. Also that the defendant company was negligent in permitting the carriage to be overcrowded and so facilitating the hustling and robbing of the plaintiff. The plaintiff claimed as damages the amount of money of which he had been robbed:—*Held*, affirming the decision of the Court of Appeal ([1893] 1 Q. B. 459), that the statement of claim disclosed no breach of duty on the part of the defendant company, and no cause of action.—Observations on *Pounder* v. *North Eastern Railway Company* ([1892] 1 Q. B. 385). COBB *v.* GREAT WESTERN RAILWAY COMPANY - - - - - - 419

—— Accommodation works—Law of Jamaica 243
See PRIVY COUNCIL APPEALS—JAMAICA. 2.

—— Exclusive right to portions of streets—Law of Manitoba - - - 615
See PRIVY COUNCIL APPEALS—CANADA. 2.

RAILWAY TIME-TABLES—Copyright—Circular tours - - - - 335
See SCOTCH LAW. 3.

REGISTRATION—Mortgage—Priority—Law of New South Wales - - 260
See PRIVY COUNCIL APPEALS — NEW SOUTH WALES. 5.

—— Patent agent—Rules of Board of Trade 347
See SCOTCH LAW. 7.

—— Trade-mark - - - - 8
See TRADE-MARK.

RELIGIOUS EDUCATION—Scheme for endowed school - - - - 252
See ENDOWED SCHOOL.

REVENUE—Legacy and probate duty—Scotch law - - - - 83, 291
See SCOTCH LAW. 8, 9.

RESTRAINT OF TRADE — *Covenant — General Restraint—Partial Restraint — Time — Space — Public Policy.*] A patentee and manufacturer of guns and ammunition for purposes of war covenanted with a company to which his patents and business had been transferred that he would not for twenty-five years engage except on behalf of the company either directly or indirectly in the business of a manufacturer of guns or ammunition:—*Held*, affirming the decision of the Court of Appeal ([1893] 1 Ch. 630), that the covenant though unrestricted as to space was not, having regard to the nature of the business and the limited number of the customers (namely the Governments of this and other countries), wider than was necessary for the protection of the company, nor injurious to the public interests of this country; that it was therefore valid and might be enforced by injunction. NORDENFELT *v.* MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY - - - - - 535

RULES IN BANKRUPTCY, 1866—Rules 260, 262, 264 - - - - 607
See BANKRUPTCY.

RULES OF SUPREME COURT—Order XVI., r. 1
See PRACTICE—SUPREME COURT. [494

—— **Order XVIII., rr. 1, 8** - - - 494
See PRACTICE—SUPREME COURT.

—— **Order XLVIII. A, rr. 5, 8** - - 607
See BANKRUPTCY.

SAILING RULES—Ship—Collision - 1
See SHIP. 1.

SCHEME FOR ENDOWED SCHOOL—Powers of Commissioners - - - 252
See ENDOWED SCHOOL.

SCOTCH LAW—*Contract — Conflict of Laws — Scotch and English Law—Locus solutionis—Reference to unnamed Arbitrators—Intention—Arbitration Act*, 1889 (52 *& 53 Vict. c.* 49), *s.* 4.] Where a contract is entered into between parties residing in different countries where different systems of law prevail, it is a question in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. —A contract between an English and a Scotch firm, signed in London, but to be performed in Scotland, contained this stipulation: "Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way."—In an action raised by the Scotch firm in Scotland for implement of the contract and for damages, the English firm pleaded that the action was excluded by the arbitration clause. The Scotch Courts held that the clause was governed by the law of Scotland, inasmuch as that country was the locus solutionis and that the reference, being to arbitrators unnamed, was therefore invalid:—*Held*, reversing the decision of the Court of Session (21 Court Sess. Cas. 4th Series (Rettie), 204), that the contract was governed by English law, according to which the arbitration clause was valid, and deprived the Scotch Courts of jurisdiction to decide upon the merits of the case, unless the arbitration proved abortive. HAMLYN & CO. *v.* TALISKER DISTILLERY - - - - - 202

2. —— *Contract for Sale—Re-sale for enhanced Price—Misrepresentation—Restitutio in integrum.*] On the 11th of November, 1889, the respondents arranged for the sale of a brewery in Edinburgh to D. The purchase was to take place as from the 15th of November, 1889, at the price of £20,500, the price to be paid by the 31st of December, at which date a conveyance was to be executed either to D. or to any company to which he might assign his interest. On the 14th of December, D. entered into an agreement to sell the brewery to the appellants; the price to be paid to D. by the appellants was £28,500. This contract purported to pass on all the rights of D. On the 31st of December a conveyance was executed by the respondents at the instance of D., in implement of the contract of the 11th of November, 1889, to the appellants, and D. ceased to have any interest in the brewery. In the contract of the 11th of November, 1889, were these conditions: "the arrangement proceeds upon the

SCOTCH LAW—*continued.*

basis that the net profits of the brewery amounted during each of two years, ending the 31st of December, 1888, to £3750, or thereabouts, upon an average." "In the event of its being ascertained that this is not the fact, the arrangement is to be at an end." The conveyance of the 31st of December to the appellants did not set out these stipulations. Also by the contract of the 11th of November, 1889, D. was to be at liberty to have all the books connected with the business examined. All the books were examined by accountants selected by D., and a profit near the stipulated amount was reported. More than a year after the conveyance to the appellants, it was discovered that the books had been improperly dealt with by a clerk in the respondents' employment without the knowledge of the respondents. The alterations made the profits appear greater than they really were.—Under these circumstances, the appellants, with the concurrence of D., raised this action for reduction of the contract between the respondents and D., and the conveyance by the respondents to the appellants; the appellants offering to hand back the brewery. The ground of their contention was, first, that as between the respondents and D. the amount of the profits was made the basis of the agreement. And, secondly, that all the rights of D. were passed by him to the appellants. No action was taken to rescind the contract between D. and the appellants:—*Held*, affirming the decision (but not agreeing in all the views) of the Court of Session, Scotland (20 Court Sess. Cas. 4th Series (Rettie), 581), that the appellants and D. had no title to maintain the action, D. having no interest in the subject-matter, the brewery; and, the disposition not embodying nor being intending to embody the stipulations of the original contract, the appellants had no right as against the respondents. EDINBURGH UNITED BREWERIES *v.* MOLLESON 96

3. —— *Copyright — Railway Time-tables — Circular Tours—Piracy—Copyright Act* (5 & 6 *Vict. c.* 45), *s.* 19.] The mere publication in any particular order of the time-tables issued by railway companies cannot be claimed as a subject-matter of copyright, if no more has been done than to copy them in their order, leaving out such stations as the author thinks fit.—But abridged information of train service in connection with circular tours of a particular locality may be the subject-matter of copyright.—The appellant, the proprietor of a monthly penny railway time-table affecting the Perth district, sought an injunction against the respondents, the publishers of a new Perth railway time-table, to restrain, inter alia, the sale of their time-tables for July, 1891, on the ground of infringement. He alleged that the respondents, instead of going to the common and public sources for materials, substantially copied his book, and thus took advantage of his skill and labour in condensing into a small space a huge mass of information. That they had also copied his circular tour information. This latter charge was practically admitted. The circular tour information occupied only four pages out of about forty of the appellant's book:—*Held*, reversing the decision of the Court of Session (20 Court Sess. Cas. 4th Series (Rettie), 1077), that the appellant was entitled to an injunction against the reproduction of his compilation of circular tours, it being an abridgment of information of a most useful description, and, although it occupied such a small space, it was to be treated as an independent work, and protected by copyright law:—*Held*, secondly, affirming the decision of the Court of Session, that the appellant was not entitled to an injunction with respect to the railway time-tables, for the books were not by any means identical; and it being only necessary for either party to copy such tables in order to provide the same information in his book as in that of the other party, substantial appropriation must be shewn before proceedings on the ground of infringement of copyright could be justified. LESLIE *v.* YOUNG & SONS - - - 335

SCOTCH LAW—*continued.*

4. —— *Joint Delinquents — Negligence — Damages—Joint and several Decree against both —Action by Payee of the whole Damages for Contribution from the co-Debtor.*] The appellant, a stevedore, was engaged in discharging pig-iron from the respondents' ship when one of his workmen was killed by the fall of a block, part of the ship's tackle. The family of the deceased brought actions, which were conjoined, against the respondents and the appellant, alleging against the former the supplying of weak tackle, and against the latter reckless negligence in the use of the same. The jury found both defenders liable, and assessed the total damages at £600. The Court applied the verdict by a decree against the appellant and respondents jointly and severally for the full amount of the damages, and costs for which also they gave a joint and several decree. The respondents paid both demands, and took an assignation to the decrees. The appellant having refused to pay his moiety on the ground that he and the respondents being joint wrongdoers they had no claim of relief:—*Held*, affirming the decision of the Court of Session (20 Court Sess. Cas. 4th Series (Rettie), 275), that the appellant was liable, the foundation of the respondents' claim resting on a decree which created a civil debt.—*Merryweather* v. *Nixan* (8 T. R. 186) is not founded on any principle of equity and ought not to be extended. PALMER *v.* WICK AND PULTENEYTOWN STEAM SHIPPING COMPANY - - - - - 318

5. —— *Lease—Agricultural Holdings (Scotland) Act*, 1883 (46 & 47 *Vict. c.* 62), *ss.* 2, 7, 28 — *Compensation for Improvements — Notice — "Determination of Tenancy."*] Sect. 2 of the Agricultural Holdings (Scotland) Act, 1883 (46 & 47 Vict. c. 62), confers upon a tenant of agricultural or pastoral lands, "on quitting his holding at the determination of a tenancy," the right to obtain from his landlord compensation for certain improvements. It is provided by sect. 7 that a tenant shall not be entitled to compensation under the Act unless "four months at least *before the determination of the tenancy* he gives notice in writing to the landlord of his intention to make a claim." The only difference in sect. 7 of the English Agricultural Holdings Act, 1883, is, that the notice required is two months instead of four.—The appellant, owner of a farm in Scotland, obtained a decree ordering

SCOTCH LAW—*continued.*

the respondent, the tenant, to remove (following the stipulations in the lease) from the houses, grass and fallow land, at the term of Whitsunday, 1892; from the arable land at the separation of the crop of the same year from the ground; and from the barns and barn-yard and two cot-houses at Whitsunday, 1893.—The respondent quitted possession of the houses (with the exception of the barns, barn-yard, and two cot-houses), and also of the grass and fallow lands, at the term of Whitsunday, 1892. He thereafter, on the 6th of June, 1892, gave the appellant notice of a claim for improvements:—*Held*, affirming the decision of the Court of Session (21 Court Sess. Cas. 4th Series (Rettie), 41), that there were three terms of removal in regard to different portions of the subject-matter of the lease, and that a notice four months before the "separation of the crop" (or its equivalent term Martinmas) after Whitsunday, 1892, was sufficient.—By Lord Watson: the terms of sect. 35 give rise to serious doubts whether the bare possession of a barn, barn-yard, and cot-houses unconnected with any land, pastoral or agricultural, is possession of a "holding" recognised by the Act.—*Wight* v. *Earl of Hopetoun* (4 Macq. 729) distinguished. BLACK *v.* CLAY **368**

6. —— *Marine Insurance—Mutual Insurance Company—Articles of Association imported into Policy—Whether addition to Article not legally passed by the Company was a Condition of the Policy.*] The pursuer insured his ship with the defenders, a mutual assurance association. The policy provided that the "provisions contained in the articles of association shall be deemed and considered part of this policy." Five years before the date of the policy the company, having full power under its articles of association to do so, resolved to alter, inter alia, one of its articles, by substituting these words for others: "That it shall be a condition of this insurance that the assured shall keep one-fifth" (of the value of such ship) "uninsured." This addition to the article was not confirmed by a special resolution passed in accordance with the Companies Act, 1862, ss. 50, 51; but it was registered, and printed with the articles on the back of each policy. The pursuer had also insured with another company, the result being that he had insured altogether for more than four-fifths:—*Held*, affirming the decision of the Court of Session (20 Court Sess. Cas. 4th Series (Rettie), 442), that the irregularity in the procedure by which the article had been altered did not prevent it from being binding upon the pursuer, and that, the condition contained in such article having been broken, he was not entitled to recover upon the policy. MUIRHEAD *v.* FORTH AND NORTH SEA STEAMBOAT MUTUAL INSURANCE ASSOCIATION - - **72**

7. —— *Patent—Statute—Tax—Ultrà Vires—Board of Trade—Jurisdiction — Title to Sue—Patents, Designs, and Trade Marks Act,* 1883 (46 *&* 47 *Vict. c.* 57), *s.* 101, *and* 1888 (51 *&* 52 *Vict. c.* 50), *s.* 1—*Register of Patent Agents Rules,* 1889.] By the Patents, Designs, and Trade Marks Act, 1883, s. 101: "The Board of Trade may from time to time make such general rules" . . . "as they think expedient, subject to the provisions of this Act. (*a*) For regulating

SCOTCH LAW—*continued.*

the practice of registration under this Act." By sub-sect. 3: "General rules may be made under this section" . . . "and shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed." By sub-sect. 4: "Any rules made in pursuance of this section shall be laid before both Houses of Parliament." By sub-sect. 5: "If either House of Parliament, within the next forty days after any rules have been so laid before such house, resolve that such rules or any of them ought to be annulled, the same shall, after the date of such resolution, be of no effect."—By the Patents, Designs, and Trade Marks Act, 1888, s. 1, sub-s. 1, "after the 1st of July, 1889, a person shall not be entitled to describe himself as a patent agent . . . . unless he is registered as a patent agent in pursuance of this Act." And by sub-sect. 2, "The Board of Trade shall . . . . make such general rules as are in the opinion of the Board required for giving effect to this section, and the provisions of sect. 101 of the principal Act" (the Act of 1883) "shall apply to all rules so made as if they were made in pursuance of that section." By sub-sect. 3, Every person who proves to the satisfaction of the Board of Trade that, prior to the Act, he had bonâ fide practised as a patent agent should be entitled to be registered in pursuance of the Act. By sub-sect. 4, "If any person knowingly describes himself as a patent agent in contravention of this section, he shall be liable on summary conviction to a fine not exceeding £20."—The Board of Trade made certain rules known as the Register of Patent Agents Rules, 1889, which were laid before Parliament, and no objection was taken to them within the forty days specified by the principal Act. They provided (inter alia) for the mode by which a patent agent practising before the Act of 1888 should be entered in the register; and also for the payment of an entrance fee, and an annual fee by all patent agents continuing on the register, and for erasure from the register of the name of any person whose annual fee was not paid:—*Held*, reversing in part the decision of the Court of Session (20 Court Sess. Cas. 4th Series (Rettie), 315), that the rules having been laid before both Houses of Parliament for forty days without being annulled were "of the same effect as if they were contained in the" statute, and as long as they remained in force it was not competent to question their authority. And, secondly, that the right mode of procedure against an unregistered patent agent was by way of summary proceeding for the penalty.—Lord Morris, while agreeing that these rules were ultrà vires, dissented from the view that it was not competent for the Courts to question the validity of the rules. INSTITUTE OF PATENT AGENTS *v.* LOCKWOOD - - **347**

8. —— *Revenue—Inventory, or Probate, Duty; and Legacy Duties—Legatees identified by reference to Will of another Testator—Whether Duties under both Wills must be paid*—48 *Geo.* 3 (1808), *c.* 149, *s.* 38—*The Stamp Act,* 1815 (55 *Geo.* 3), *c.* 184, *s.* 37—*Stamp Duties Act,* 1845 (8 *&* 9 *Vict. c.* 76), *s.* 4—*Stamp Duties, &c., Act,* 1860 (23 *Vict. c.* 15), *s.* 4—44 *Vict. c.* 12, *s.* 32.] By the Stamp Act, 1815 (55 Geo. 3, c. 184), s. 37, the estate

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liable to inventory duty or probate duty is defined as "the personal estate and effects of any person deceased."—By sect. 4 of the Stamp Duties Act, 1845 (8 & 9 Vict. c. 76), it is provided that the following shall be deemed a legacy liable to duty: "Every gift by any will," &c., "of any person which by virtue of any such will, &c., shall have effect or be satisfied out of the personal or moveable estate or effects of such person, or out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of."—By sect. 4 of the Stamp Duties Act, 1860 (23 & 24 Vict. c. 15), it is enacted that the stamp duties payable by law upon inventories are to be levied and paid in respect of "all the personal or moveable estate and effects which any person hereafter dying shall have disposed of by will, under any authority enabling such person to dispose of the same as he or she shall think fit."—A. bequeathed one-third of the residue of her estate to B., and, failing him, to his executors and representatives. B. pre-deceased A., leaving a will under which he appointed executors.—The Crown having claimed, in addition to the inventory duty (called in England probate duty) and legacy duty paid by the executors of A's will, a second inventory duty and legacy duty from B.'s executors on one-third of A.'s residue, on the ground that it had been disposed of by B.'s will:—*Held*, affirming the decision of the Court of Session (20 Court Sess. Cas. 4th Series (Rettie), 429), that the Crown was not entitled to the duties claimed, the property not being the personal estate and effects of B. within the meaning of the statutes. THE LORD ADVOCATE *v.* BOGIE 83

9. —— *Revenue — Legacy Duty —Personalty directed to be invested in purchase of Land—Entail—Disentail*—36 *Geo.* 3, *c.* 52, *ss.* 12, 19—55 *Geo.* 3, *c.* 184, *s.* 2.] By sect. 12 of 36 Geo. 3, c. 52, it is provided: "That the duty payable on a legacy or residue or part of residue of any personal estate given to . . . different persons in succession who shall be chargeable with the duties hereby imposed at one and the same rate shall be charged upon and paid out of the legacy or residue or part of residue so given as in the case of a legacy to one person; and where any legacy or residue shall be given to . . . different persons in succession some or one of whom shall be chargeable with no duty or some of whom shall be chargeable with different rates of duty so that one rate of duty cannot be immediately charged thereon all persons who under or in consequence of any such bequest shall be entitled for life only or any other temporary interest shall be chargeable with the duty in respect of such bequest as if the annual produce had been given by way of annuity," and "all and every person and persons who shall become absolutely entitled to any such legacy or residue, &c., so to be enjoyed in succession shall when and as such person or persons respectively . . . begin to enjoy the benefit thereof be chargeable with and pay the duty for the same . . . in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed."—By sect. 19 it is provided: "That any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with and pay duty as personal estate; unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued" . . . "Provided, nevertheless, that in case before the same, or some part thereof, shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons and raised and paid out of the fund remaining to be applied in such purchase."—A testator died on the 30th of September, 1883, leaving a will by which he directed his trustees to accumulate the whole rents and proceeds of the residue of his estate for six years after his decease, and during those six years to realize his whole movable estate and specified heritable property to the extent of about £350,000, and therewith at their discretion, within the six years or not, to purchase land in Scotland and entail the same on his nephew W. H. D. and the heirs male of his body, whom failing to other substitutes in succession, declaring that after the six years had expired the heir of entail in possession (W. H. D.) should be entitled to receive the interest of the entire property until the lands were purchased. The six years expired on the 30th of September, 1889. Afterwards W. H. D. presented a petition to the Court for disentail under the Scotch Entail Acts of 1848–1882. Having by private arrangement obtained the consent of the three next heirs (his sons), he obtained an order directing the trustees to convey in fee simple the lands and the moneys held by them. The trustees had only laid out about £21,000 in land before the six years had expired; and another sum of £12,000 in building a mansion-house.—The Crown claimed from the trustees legacy duty at 5 per cent. upon the capital of the whole residue of the movable estate:—*Held*, affirming, but not on the same grounds, the judgment of the Court of Session (19 Court Sess. Cas. (Rettie), 461) that the Crown was entitled to the duty, for, first, the words "shall become entitled to an estate of inheritance in possession in real estate," must be taken to apply to a person who would become entitled if real estate were purchased, to an estate of inheritance therein; and W. H. D. was in that position, for, if land had been purchased, he could have claimed a conveyance to himself which would have vested in him an estate of inheritance in possession; secondly, the compensation paid to the three next heirs of entail did not fall to be deducted before the duty was paid; and, thirdly, neither did the sum of £12,000 expended on building a mansion-house, that not being a specific

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purchase of land.—Per Lord Herschell, L.C.: That W. H. D. (if it were necessary to decide the point) was liable under the latter part of sect. 12. MACFARLANE *v.* THE LORD ADVOCATE - 291

10. —— *Ship — Collision — Regulations for Preventing Collisions at Sea, August* 11, 1884, *Articles* 15, 18, 19, *and* 21.] The steamships *Thorsa* and *Otto* were approaching each other, generally speaking, on opposite courses in daylight in a narrow channel. In a manœuvre by the *Thorsa* to pass another vessel, the *Thorsa* and *Otto* became nearly end on. When about a mile apart, the *Thorsa* signalled that she was going to starboard, and at the same time put her helm to port to pass the *Otto* on the port side. This brought her head nearly a point to starboard. The *Otto* heard, but kept a steady course. Two minutes or so afterwards, when the ships were within half a mile, the *Thorsa* repeated the signal, and again ported her helm. The *Otto* immediately afterwards starboarded her helm, bringing her head to port, and went across the bows of the *Thorsa.* The *Thorsa* immediately stopped and reversed, but she ran into and sank the *Otto.* The owners of the *Otto*, while admitting that their vessel had been in fault, alleged fault also against the *Thorsa* in not stopping and reversing at an earlier period:—*Held*, affirming the decision of the Second Division of the Court of Session (20 Court Sess. Cas. 4th Series (Rettie), 876), that no fault was attributable to the *Thorsa.* WILSON, SONS & CO. *v.* CURRIE - - 116

11. —— *Ship — Cargo — Freight — General Average—Cargo in Peril—Expenses of Landing and Transporting Cargo to Place of Safety—Extraordinary Expenditure for General Benefit—Remuneration to Shipowner's Agent—Sale of Unidentified Cargo—Commission.*] Where after a disaster at sea the shipowner, not merely with a view to freight but in the interests of the whole adventure or of the cargo-owners, and before he has elected to abandon his ship and carry on the cargo in another ship, incurs necessary expenses in landing and preserving a perishable cargo and carrying it to a place of safety, the expenses ought not to be charged to freight alone, but are either a general average charge, or a charge against cargo, or against cargo and freight, as the case may be.—Where such a disaster happens, there is no rigid rule of law that the shipowner may not employ experienced persons to act in his place for the benefit of all concerned. Whether he is entitled to do so, and to make this extraordinary expenditure a general average charge, must depend on the circumstances of the case, and upon whether he acts reasonably and properly.—So as to the right to charge against the cargo-owners a commission to a commission merchant for arranging the sale of unidentified bales of cargo.—*Schuster* v. *Fletcher* (3 Q. B. D. 418) disapproved. ROSE *v.* BANK OF AUSTRALASIA 687

12. —— *Succession—Vesting—Substitution—General Disposition.*] Where a lay testator who writes his own will uses words which have an intelligible conventional meaning, he is not to be held as having used the words with any other meaning, unless the context of the instrument shews that he intended to do so.—Where a will gives an unqualified bequest of land, making no reference to the time at which it is to operate, the gift takes effect a morte testatoris, except where that date would disturb any of the provisions already made in the will, or where the testator has clearly indicated that he did not intend it to operate until a later period.—A testator, by his will, gave the life-rent of his entire estate, heritable and movable, to his wife, who survived him. The will proceeded: "I also leave to my nephew," W., the estate of Bankhead; but I wish it expressly understood that in the event of my said nephew," W., "dying without leaving any lawful male heir of his body, then, and in that event, my said lands of Bankhead are to revert back to my nephew," H.—The nephew W. survived the testator, but died unmarried before the testator's widow. W. left a general disposition disposing of all estate which might belong to him. On the widow's death, the nephew H. claimed Bankhead:—*Held*, affirming the decision of the Court of Session (21 Court Sess. Cas. 4th Series (Rettie), 451), that the estate of Bankhead had vested in W. a morte testatoris, and that it was conveyed to W.'s trustees by his general disposition. HAMILTON *v.* RITCHIE 310

13. —— *Tramway—Purchase of Undertaking by Local Authority—Terms of Purchase—Valuation of Tramway—Rental Value—Tramways Act,* 1870 (33 & 34 *Vict. c.* 78), *s.* 43—*Edinburgh Tramways Act*, 1871 (34 & 35 *Vict. c. lxxxix.*)] By sect. 34 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), it is enacted that the promoters of tramways authorized by special Act and their lessees shall have the exclusive use of their tramways for carriages with flange wheels, or other wheels suitable only to run on the prescribed rail:—By sect. 43, where the promoters (in this case the appellants) of a tramway in any district are not the local authority, the local authority may, within six months after the expiration of a period of twenty-one years from the time when such promoters were empowered to construct such tramway . . . . by notice in writing require such promoters to sell . . . . to them their undertaking, or so much of the same as is within such district, upon the terms of paying "the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within such district." Such value to be in case of difference determined by a referee. "And when any such sale has been made, all the rights, powers, and authorities of such promoters in respect to the undertaking sold . . . . shall be transferred to, vested in, and may be exercised by the authority to whom the same has been sold in like manner as if such tramway was constructed by such authority under . . . . a provisional order under this Act, and in reference to the same they shall be deemed to be the promoters."—The appellants, the Edinburgh Street Tramways Company, were authorized to construct tramways by the Edinburgh Tramways Act, 1871 (34 & 35 Vict. c. lxxxix.), which incorpo-

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rated the general provisions of the Tramways Act, 1870. The respondents, the Lord Provost, &c., of Edinburgh—the local authority—gave notice in 1892, under sect. 43 of the general Act, to purchase the appellants' undertaking:—*Held* (Lord Ashbourne dissenting), affirming the decision of the Court of Session (21 Court Sess. Cas. 4th Series (Rettie), 688), that, on a sale to the local authority, the local authority became entitled to the exclusive use of the tramway, not by transference of any right from the promoters, but by virtue of the statute alone. Secondly, that the word "tramway" could not be read as synonymous with "undertaking," but was used in the Act as meaning the structure laid down on the highway, and nothing more; therefore the "then value of the tramway" must be measured by what it would cost, at the date of the sale, to construct the lines, subject to a deduction for depreciation, and that rental value must not be taken into consideration. EDINBURGH STREET TRAMWAYS COMPANY *v.* LORD PROVOST, &C., OF EDINBURGH - - - - - 456

SETTLEMENT OF POOR—Infant under sixteen
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SETTLER—Land in British Columbia—Agricultural purposes - - - 429
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SHARES—Issue at a discount—Law of Cape of Good Hope - - - - 654
See PRIVY COUNCIL APPEALS—CAPE OF GOOD HOPE.

—— Purchase by company of its own shares 399
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SHIP—*Collision—Fog—Regulations of* 1884 *for Preventing Collisions at Sea, Art.* 18.] By art. 18 of the Regulations of 1884 for Preventing Collisions at Sea: "Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed or stop and reverse, if necessary." Two steamships were approaching one another on opposite courses in a fog. One of these, the *L.*, stopped, but did not reverse, and a collision occurred:—*Held* upon the evidence that at the time when the *L.* stopped the circumstances were such as to make it apparent to a reasonable and prudent master that in order to avoid risk of collision it was necessary to stop and reverse, and that the decision of the Court of Appeal ([1893] P. 47) that the *L.* was to blame should be affirmed on the above ground, the question for decision being one of fact, not of law. BIBBY BROTHERS & CO. *v.* LEETHAM. THE "LANCASHIRE" - - - - 1

2. —— *Owner of Ship and Seaman, Contract between—Obligation of Owner under Merchant Shipping Act* 1876 (39 *&* 40 *Vict. c.* 80) *s.* 5—"*Seaworthiness*"—*Negligence—Master and Servant—Negligence of Captain—Fellow Servant—Common Employment.*] A ship was sent to sea with stanchions and rails on board, but not shipped as they ought to have been so as to raise the bulwarks at a certain part to the proper height. A storm came on and a seaman engaged in performing his duty on deck fell overboard in consequence of the neglect to ship the stanchions and rails and was drowned. It was not safe for the crew that the ship should leave port with the stanchions and rails unshipped:—*Held*, affirming the decision of the Court of Appeal ([1892] 1 Q. B. 58), that the representatives of the seaman had no claim for damages against the shipowners; for first, apart from statute, the doctrine of common employment applied and protected the owners from the consequences of the master's negligence: see *Wilson* v. *Merry* (Law Rep. 1 H. L., Sc. 326); and secondly, the neglect of duty on the part of the master did not render the ship "unseaworthy" within the meaning of sect. 5 of the Merchant Shipping Act 1876 (39 & 40 Vict. c. 80). HEDLEY *v.* PINKNEY & SONS STEAMSHIP COMPANY - 222

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TRADE-MARK—*Registration—"Person Aggrieved"—Patents, Designs, and Trade Marks Act*, 1883 (*46 & 47 Vict. c. 57*), *s. 90.*] By sect. 90 of the Patents, Designs, and Trade Marks Act, 1883, the Court may, on the application of any "person aggrieved" by the entry of a trade-mark made without sufficient cause in any register kept under the Act, make such order for expunging the entry as the Court thinks fit.—Where the applicant is in the same trade as the person who has registered the trade-mark, and where the existence of the entry upon the register would or might limit the legal rights of the applicant so that he could not lawfully do that which he could otherwise have lawfully done, he has a locus standi to be heard as a "person aggrieved."—So *held*, affirming the decisions of Chitty J. and the Court of Appeal. POWELL *v.* BIRMINGHAM VINEGAR BREWERY COMPANY - - - 8

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TRAMWAY—*Purchase of Undertaking by County Council—Terms of Purchase—Valuation of Tramway—London Street Tramways Act,* 1870 (33 & 34

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Vict. c. clxxi.) *s.* 44.] Sect. 44 of the London Street Tramways Act 1870 (33 & 34 Vict. c. clxxi.) enacts that the Metropolitan Board of Works may after twenty-one years from the passing of the Act require the London Street Tramways Company to sell to them their undertaking upon terms identical with those prescribed by s. 43 of the Tramways Act 1870 (33 & 34 Vict. c. 78), viz. "upon the terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, material and plant of the company suitable to and used by them for the purposes of their undertaking." The London County Council, as successors to the Metropolitan Board of Works, required the company to sell:—*Held*, Lord Ashbourne dissenting, that the word "tramway" meant the structure laid down and nothing more and did not include the statutory powers conferred on the company; and that the arbitrator was right in rejecting all evidence of past and future profits, including evidence of the rental value of the tramways considered as let or capable of being let to a tenant, and in awarding that "the then value of the tramway and all lands, buildings, works" &c. must be measured by what it would cost to establish the tramway if it did not then exist, subject to a proper deduction in respect of depreciation.—The decision of the Court of Appeal ([1894]) 2 Q. B. 189) affirmed. LONDON STREET TRAMWAYS COMPANY *v.* LONDON COUNTY COUNCIL - - - - - 489

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